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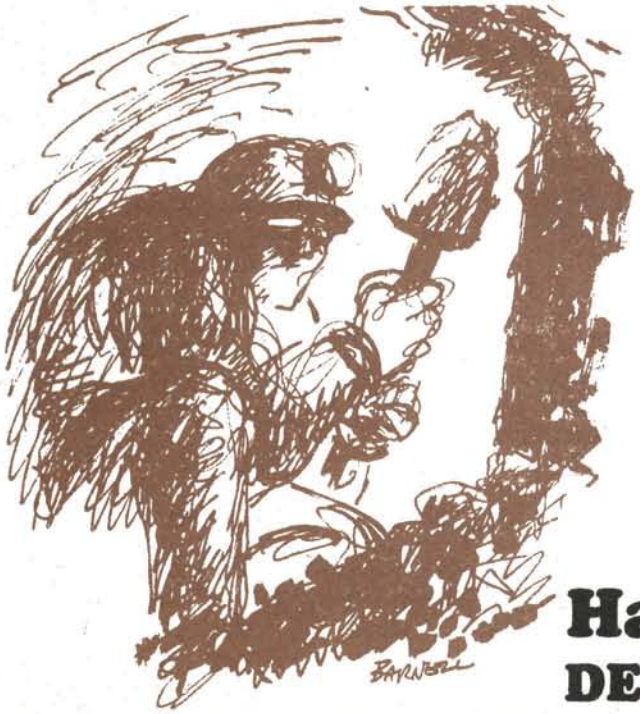

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DEAD LAWS & DEAD MEN
MANSLAUGHTER IN A COAL MINE

'Too Much Conscience
. . . Is Unprofessional'
THE BIG BOARD-ROOM LAWYERS
MARK GREEN

Peace in the Middle East
MR. CARTER GRASPS THAT NETTLE
Mark A. Bruzonsky

Inside the Gates of Eden / Perry Meisel

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EDITORIALS

The Fortress Breached

J. Edgar Hoover would have screamed from the crenelations of the FBI fortress in Washington. The tabloids would have blazoned his charge that the indictment of a former FBI agent on a felony rap for illegal mail opening and wiretapping meant the end of the republic.

But not a sound comes from Clarence Kelley's FBI. The silence gives reason to hope that at last the Federal Bureau of Investigation will be made to behave like a law-abiding law-enforcement agency, rather than the biggest lawbreaker of them all. The indictment of John J. Kearney, a former middle-level supervisor in the FBI's New York office, is the first felony charge to be brought against a bureau man in the sixty-nine-year history of the agency. It was approved by Attorney General Bell and the action is rich in symbolism.

Notoriously, the FBI, which is by law "under" the Department of Justice, has operated as an independent realm. Hoover barely gave the Attorney General, his theoretical boss, the time of day. Presidents quailed in his presence and were greedy for the gossipy bits of blackmail on Congressmen which he dropped in chats with them. Not only was the FBI not under the legal constraints controlling the rest of the government but it was a law unto itself. Maverick as the CIA became in those days, the FBI was the real rogue of the intelligence world, for it did its work here at home, and usually on American citizens, as against mere foreigners.

It is hard to tell yet what effect the Kearney indictment will have. We must, of course, presume his innocence until it is proven otherwise and, as a Washington lawyer quoted in *Time* said, "Whether an American jury will convict an FBI man for trying to combat terrorism" must remain an open question. (The operations for which Kearney was indicted were connected with attempts to track down the Weatherman bombers.)

Nevertheless, the indictment breaks the pattern of sanctioned lawlessness that blots the history of the federal police agency. Its main implication is that even the FBI will be called to account for any actions it may commit against the laws it is there to uphold. If the process of justice now begun with Kearney is allowed to stop there, it will be a scandal. The symbolism would then become a caricature. "The handwriting is on the wall," said the lawyer for another agent under investigation. "They can't indict Kearney and not go after the higher-ups as well."

A kind of Nuremberg principle is involved here. Did these agents at the middle and lower levels do their dirty tricks of bugging, tapping and mail opening on their own or were they following orders from above, implied or actually issued? Hoover, famously, was a super-bureaucrat who put everything in writing and demanded endless reports from his minions. The bureau under his dictatorship was not known for its independent initiatives. Already, the word is, the trail leads at least as high up the command chain as the No. 2 and 3 slots in the FBI. The process must reach for the top and establish once and for all the principle of accountability for all those in the FBI who would play fast and loose with the constitutional safeguards of the Fourth Amendment.

It is worth recalling that probably none of this would be seeing the light of day if the Socialist Workers Party, outrageously infiltrated and harassed by the FBI for years, had not aggressively pursued the matter, with the help of Leonard Boudin and other lawyers like him. The scandalous abuses the SWP unearthed, thanks to the Freedom of Information Act, forced the Justice Department to make its own probes.

The indictment of Kearney is the first fruit of that effort. The threatened FBI agents, through their lawyers, are crying that it means the destruction of the whole federal law-enforcement system—"agents won't know whether to carry out orders or not," said one of them. The answer to that is that they will, henceforth, be required to make judgments as to the legality of what they are told to do. Society can only benefit from that requirement. And the example of the FBI being forced to obey the laws, and suffering the consequences if it does not, should have a healthy effect on all the police in this country, right down to the county level. If they know that even the sainted G-men can be called to account, they will step more carefully on the grass of civil rights.

It is, said the attorney for some fifty of the FBI agents under investigation, "a sad and tragic day for federal law enforcement." It is, the rest of us should say, the exact opposite.

Advice from the Former Tenants

It is shocking, though hardly surprising, that "President" Ford and "Secretary" Kissinger should presume to comment in harsh if muted terms on the strategic arms negotiations President Carter has initiated with Russia. We give them their old titles because, though they pretend to speak as private citizens, the words of criticism come from men who just three months ago exercised ultimate power. They also, in those capacities and for discreditable reasons, failed to make the stabilizing arms agreement that Carter now seeks. (They held off because they thought a deal with Moscow might cost Ford the nomination, if not the election, and for no more serious reason.)

This country has had a tradition until now that on matters of vital import former Presidents do not second-guess their successors. Once out of office, they recognized, from common sense or polite custom, that they lacked essential information on which to base a judgment. They belonged to the world's most exclusive club, The Presidents Club, whose members were extraordinarily deferential to one another for the reason that no one who had not held that office could possibly understand its peculiar burdens. It even got to be a little cloying in the sunset days of Truman and Eisenhower, though there was sound reason for the rules of reticence. And the refusal of a former President to speak out on the actions of his successor contributed to the mystique of the high office.

Now all that is over. The Presidents Club is closed, padlocked, bankrupt. Gerald Rudolph Ford, the 38th President, accomplished this with a few ill-chosen words at Ann Arbor, Mich., on April 6 in a question-and-answer session with students at his alma mater. "I believe,"

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declared Ford, "that the administration went to Moscow with too optimistic a viewpoint as to what could be done. I believe that there was too much public rhetoric before the negotiations in Moscow and too much public rhetoric after the consummation of the negotiations in Moscow."

Now, those who know what the word means understand that no "consummation" was achieved, or indeed intended, at Moscow. As for the expression "public rhetoric," one can only wish that the speaker had illustrated his complaint with an example of "private rhetoric."

But infelicities and garbled speech aside, Ford was trying to say something he deeply meant. "I hope and trust," he went on, "that the administration has not put themselves in a position where they cannot achieve an agreement." Then comes the ominous note: ". . . if they in any way make significant reductions in the decisions they took publicly and presented to the Soviet Union, they could and probably will be subjected to very, very vigorous condemnation by certain elements within the United States."

Guess who would be in the vanguard of the vigorous condemners of any "weakness" Carter might show in the bargaining to come? Why, Gerald R. Ford, of course, and his legion of reactionary friends. The hunting licenses for open season on Carter the Negotiator are already being issued in Palm Springs.

Henry Kissinger, that other NBC commentator, always cut a better figure on the podium than did his "boss," and his language on the day before Ford misspoke reads more smoothly. *The New York Times* headline on April 6 said "Kissinger Urges U.S. and Soviet to End Rhetoric," but his words were sybilline: "Negotiations must proceed in a calm, nonconfrontational way without self-imposed deadlines or rhetorical battles that publicly stake the prestige of both sides." It was more a professorial lecture to his inexperienced successors than a slap on their wrists. He also had the grace to say that Carter's effort to work out a new strategic arms treaty "deserves the support of every American."

Still, the great old days, so to speak, of Kissingerian secret diplomacy are over, gone with the new winds from the South. President Carter believes in a more open kind of dealing with foreign powers, one that takes public (and Congressional) opinion into account. He knows that a relatively open covenant, fairly openly arrived at, has a better chance of ratification by two-thirds of the Senate. And he is right that a rather public style of diplomacy works toward that essential end. Since the "breakdown," as it was absurdly called, of the Vance mission to Moscow, the President has let it be known that he has had word from Brezhnev that Russia is serious about wanting to reach a new SALT agreement. So the breakdown was, at worst, a temporary halt on the way.

A curious and even comical coda to the era of super-secret diplomacy is provided by a story in the *Times* of April 11. It seems that Richard Nixon told the Chinese on his famous trip to Peking in 1972 that he wanted very much to "normalize" relations with China and intended to do just that upon his re-election. That meant establishing formal diplomatic relations with Mao's China and, as the *Times* exquisitely puts it, "some rupture in the American defense treaty with Taiwan." It was all

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spelled out in a Presidential "memorandum of conversation" with the then Premier Chou En-lai. The Chinese apparently kept hinting at the existence of such an undertaking, but were too proud to come right out and say that it was made.

Then Watergate caused, among other things, "some rupture" in Nixon's diplomatic game plan, and after that Gerald Ford had Ronald Reagan nipping at his heels in a distracting way, so nothing happened to normalize the Washington-Peking relations. The Chinese sulked in puzzlement and the dialogue deteriorated to mere formality. During its second month in office the Carter administration got a hint of Nixon's promise from a column by Joseph Kraft; it searched the files, but found nothing. Then someone had the bright idea of asking Nixon for the memorandum and, says the *Times*, it was "immediately made available" by his lawyers.

Perhaps that strange man in San Clemente is the sole surviving member of The Presidents Club. He would give the minutes of the last meeting to the newly elected member, if properly asked.

A Distant War, Maybe

Someone is lying about the situation in Zaire. More likely, everyone is. The only certainty about it is that something of a vaguely military sort is going on in the Shaba region that used to be called Katanga. Only the birds and the beasts know if there's a real war in that far-off jungle, and they're not talking.

President Mobutu Sese Seko says the "Communists" are heavily involved, with Cubans in the vanguard. Cuba's Defense Minister, Gen. Raul Castro, told the South Dakota basketball Senators, McGovern and Abourezk, and Rep. Les Aspin (D., Wis.) in Havana a few days ago that he never heard of the incursion into Shaba until it happened. The Russians are playing innocent. China is worried. Morocco has sent in battalions in transport planes provided by France. Egypt and Sudan have offered help to Mobutu but no one seems to know what help he needs. (An article by Reed Kramer in next week's *Nation* will make evident the reasons for this international response to the African brushfire.)

Our own government is taking an apprehensive view from a low profile, so to speak—we have sent in a few planeloads of supplies but no arms, which made Mobutu say he was "bitterly disappointed" with Carter. (The most interesting revelation, from a *Newsweek* interview with Zaire's President, was that Holden Roberto, leader of one of the two losing factions the United States backed in the struggle for Angola, is no kin of Mobutu—he has always been described as his brother-in-law.)

The one person who seems certain about the struggle in Zaire, if that's what it is, is Henry Kissinger. One remembers that as Secretary of State he "discovered" Africa in his last year in office. It became a late-blooming obsession of his, a new arena for the continuing struggle with Russia. With this calculation in mind, he got us involved in the three-way struggle for Angola, Zaire's neighbor, in 1975. We were on the anti-Communist losing side, naturally, and Congress put a stop to this misadventure, much to Kissinger's annoyance.

With that background in mind, Kissinger in his first speech since he left power warned a Washington audience on April 4 of dire things to come "if all African problems are to be settled hereafter by radical means with weapons brought in from outside." He foresaw as one of the consequences "a catastrophic race war in southern Africa . . . with profound implications for us both at home and around the world." That's about as gloomy as even he can get. Is it justified?

Whatever is going on in Zaire's southern province, it is basically a conflict between or among Africans and it seems likely to stay that way. Tribal quarrels from the past are far more important in this area than geopolitical factors. Mobutu sits on a shaky Presidential throne which his erratic behavior has done little to stabilize. A bloody coup just happened across the Congo River from his capital, and the same could happen to Mobutu any day. It is a cauldron bubbling with native ingredients which outside interference can only bring more quickly to a boil.

American policy in southern Africa is changing from full, if covert, support for the two remaining white racist regimes, in Rhodesia and South Africa, to backing the black African majorities' drive for control of their own lands. The first sign of the change is a certain detachment from purely African conflicts and a refusal to regard each of them as an encounter in the big power contest with Russia.

Will the great powers have the sense to stay at arm's length? Even that is not sure. But the Carter administration seems to have no stomach for picking up the white man's burden Kissinger was forced to drop. That at least is a good sign. If the United States hangs back, so may the Russians, though that cannot be guaranteed. For the moment it seems wise for us to hesitate as we are doing. Inaction is sometimes the best course.

Waiting for Jobs

On Tuesday, April 5, at 1 P.M., a 17-year-old boy named Charles Butcher began standing in line on Manhattan's upper West Side. What he wanted was a job—one of the federally financed, part-time jobs paying $2.30 an hour that will be available through community agencies this summer. At 3 A.M. the next chilly morning, Charles and the other teen-agers on the line were allowed to enter a school where they could doze and keep warm while waiting. All across New York City the same process was taking place, with 20,000 teen-agers from families below the poverty line queueing up for the first day of job registration. The City has been allocated 58,810 jobs, for an estimated 500,000 eligible candidates.

The youthful throngs shivering through the night created one of those rare moments when the misery underlying the American economy suddenly and briefly becomes visible, as though a flashbulb had exploded in a dark room, revealing to the startled occupants a muffled act of violence taking place in their midst. Official figures now set unemployment at 7.3 percent, though in fact it is much higher. Among young blacks the rate is near 40 percent. Yet the unemployed in the United States—particularly today, when popular political movements are at

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a low ebb and the country seems in a drugged sleep—suffer silently; they are isolated, unorganized, and often feel personally responsible for their idleness. As a result they go unnoticed. The urban youngsters who are discarded by society even before their mature lives have begun, and who are thus condemned to a hopeless, dog-eat-dog existence, make headlines only when they mug the elderly or sell hard drugs to their fellows at the age of 14. So the appearance in one day of 20,000 of them looking for work—almost certainly to supplement their families' desperately low incomes—can still come as a surprise, though it is the surprise itself that is dismaying.

Presumably the goal of the Carter administration's economic program, now being shaped by the usual executive-Congressional skirmishes, is to spare us such surprises in future. Yet as the outlines of that program, and the thinking behind it, become clear, there is small reason for optimism. Carter's proposed economic stimulus, which includes the creation of a modest number of public-service jobs, was probably the least he could offer and still retain liberal support. And recently, even as the recovery proceeds at a glacial pace and corporate profits soar to record levels, the messages from Washington have largely concerned the anxieties of that band of neurasthenics, American businessmen. The stock market has been dithering and capital investment lagging, we are told, because of that lurking beast, inflation. Treasury Secretary Michael Blumenthal struck a typical note in a recent interview when he said, "Double-digit inflation and the most severe recession in forty years have severely shaken confidence and it's not easy to get it back. . . . Businessmen do not rush to their checkbooks to order plant equipment with the same alacrity that they used to." To spur their courage, Blumenthal said that later this year the administration would "move on . . . toward tax legislation that will provide incentives for investment in plant and equipment to increase productivity, research and development, and all of those things that will give [businessmen] confidence. . . ."

There are several problems with this program of socialism for the rich. In the first place, businessmen themselves are partially responsible for the inflation that so terrifies them; the symbiotic relationship that exists between labor and capital in the quasi-monopolized sector of the economy—steel, rubber, auto, oil, etc.—has brought about the famous phenomenon of "administered prices," under which unionized workers can be given large wage increases because the lack of competition allows management to raise prices to whatever level they feel necessary. Secondly, as Robert Lekachman noted in *The Nation* last December 18, the "incentives" (read tax cuts) referred to by Blumenthal will bleed the government of revenue sorely needed for social welfare. If the money is spent anyway, the result is a massive deficit—and more inflation.

But there is no indication that social spending will fare at all well, especially given the lack of grass-roots protest. Carter still talks of a balanced budget by 1980, which can be achieved, assuming the military share remains sacrosanct, only by a recovery much more vigorous than seems probable, or by cutting back on welfare. At a time when the need for social spending of every sort—mass transit, health insurance, public-service jobs, to name just a few—has hardly ever before been so great, the contrary mood seems to be creeping over a government completely dominated by Democrats.

On March 31, for instance, Congress allowed the Emergency Compensation Unemployment Assistance Act of 1975 to expire, which means that unemployed workers will no longer receive sixty-five weeks of compensation; the law now being prepared will grant at most fifty-two weeks, and perhaps only thirty-nine. In New York State alone, 55,000 people will lose benefits immediately.

It is a gloomy picture, as New York's teen-agers must have reflected, waiting there through the night. One can only imagine their fury and frustration if they are forced, as now seems possible, to wait through their whole lives.

'TOO MUCH CONSCIENCE . . . IS UNPROFESSIONAL'

THE BIG BOARD-ROOM LAWYERS

MARK GREEN

At one time or another most of the best lawyers of the country have been engaged in efforts to prevent enforcement of the law.

—Louis Brandeis

Washington

Corporate lawyers have long been modest, not to say secretive, about their activities. "We're only a bunch of lawyers trying to conduct a practice," says John Sapienza, managing partner at Covington & Burling in Washington, D.C., while his colleagues regularly emphasize that they are merely actors in a play scripted by clients and reviewed by judges. Canons of Ethics, which prohibit advertising and soliciting and exalt lawyer-client confidentiality, reinforce this secrecy, and enable corporate law firms to parry journalistic inquiries into their practice. "For this reporter," wrote Martin Mayer, author of *The Lawyers*, "this canon has been, inelegantly, a pain in the neck."

From personal experience, I concur. Of several hundred attorneys I have attempted to interview for two books on the profession, at least 50 percent refused, citing the

Mark Green, a lawyer and the director of Public Citizen's Congress Watch, is the author or editor of several books on law and government, including The Other Government: The Unseen Power of Washington Lawyers (*W.W. Norton paperback to be issued in the fall*).

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canons; and of those who agreed, more than 90 percent insisted that their remarks be not-for-attribution. For example, in order to interview the powerful Washington lawyer Lloyd Cutler in 1970 I had first to obtain assurance from the American Bar Association that his cooperation would not be considered unethical advertising or soliciting. (When I asked Cutler how a critique by me could possibly garner clients for him, he revealed why he is worth $250,000 a year: "Ah, but when *you* criticize me, Mr. Green, then I'd get business clients.") A Covington & Burling senior lawyer, H. Thomas Austern, was less cooperative. "Our public work is in court or agency records," he said; "the rest of our practice is no one's business but ours, and we won't talk about it." When I persisted, he asked, "Would you have cooperated with the Kinsey Report?" (My instinctive reaction was "My God! A Freudian slip about lurking sexuality in Covington's carpeted corridors." But he was engaged in analogy, not admission: by his reasoning, a legal institution that shapes public policy affecting millions has the same rights of privacy as does an individual.)

Professional aversion to public scrutiny is certainly not unique. At one time the ecclesiastical, military, medical and intelligence estates also considered themselves off-limits to outside explorers. They knew best, it was assumed. But just as they now are the subject of regular, if not always total, exposure, it is time to remove the protective cloaks of business lawyers. For though they may owe loyalty to specific private clients, lawyers—especially those Washington and New York lawyers who try to shape federal policy to client advantage—can damage the rest of us. And when it comes to corporate strategies in Congress and in the courts and regulatory agencies, they often perform more like generals than merely good soldiers.

There has not been, and probably can't be, any systematic or statistical study on the prevalence of lawyers who violate the law or abuse their power. It is approximately as likely that you'll find a whistle blower in the Vatican as at Wilmer, Cutler & Pickering. But there are signals that the members of the corporate bar do not always fulfill their oaths to "do justice" and to be "officers of the court."

"Lawyers in this country seem to be relied on to carry out 'the deal,'" complained William Cary, a former Securities and Exchange Commission chairman and now Columbia law professor. "They are involved in all business aspects. In fact, lawyers have gone so far that the next case before the courts may hold them liable as underwriters and most certainly as aiders and abettors." Indeed, the SEC has sued the New York law firm of White & Case and the Chicago firm of Lord, Bissell & Brook for their alleged role in not revealing that an unaudited report of their client had been improperly prepared. The SEC has said that the lawyer defendants should have insisted that the audit be made accurate, "and failing that, to cease representing their respective clients and, under the circumstances, notify the plaintiff commission concerning the misleading nature of the nine-month financial statements."

In discussing the recent rash of corporate bribery cases abroad, SEC Chairman Roderick Hills observed that it has been the "universal practice" of big New York law firms to pay bribes to court clerks to obtain case files. According to Senate testimony by a past Lockheed president and company accountants, Coudert Brothers, an international law firm with New York offices, allegedly paid out $100,000 in 1972 from a special Lockheed fund to an intermediary who passed it on to a high Dutch official.

John J. McCloy's outside report on Gulf Oil's foreign payoffs says that Royce H. Savage, the company's general counsel since 1961, was aware that Gulf lobbyist Claude Wild "had a source of corporate funds available to him which he was probably using for [illegal] political contributions and payments." The report continued: "As general counsel and a director, as a lawyer and former jurist, it would seem that if he had misgivings and suspicions he should have reported them to the responsible executives of the company." This incident raises overall questions about the 360 cases where American companies have admitted illegal foreign or domestic payoffs: what did the companies' lawyers know, when did they know it, and what did they do about it? Not very much, it would seem.

Or consider some recent techniques of Covington & Burling, perhaps the most blue-chip and respected pillar of the Washington legal community:

¶Some of their lawyers have run a computer for the Tobacco Institute, programmed with everything written on smoking and health. Why was it run out of C&B rather than the institute? Because, according to former attorneys of the firm, if opposing counsel ever wanted to "discover" in legal proceedings what was on the computer, Covington could claim it was the confidential "work product" of lawyers.

¶The firm has arranged to have Public Health Service reports on smoking leaked to them before the PHS's parent Department of Health, Education and Welfare, obtained the reports.

¶After one former Covington & Burling associate discovered that a client, the Electronic Industries Association, was in his view illegally dividing up markets, a firm partner told him to burn the information; the partner even cautioned against writing the client a warning, lest the law firm become implicated.

¶A partner of the firm warned a young Food and Drug Administration lawyer who was aggressively contending with them at agency hearings, "You're stunting your growth." The lawyer later said in an interview, "Listen, I'm not going to stay here forever, and where do you think I'll go with my expertise? To industry or these very law firms."

¶And finally, partner James C. McKay either winked at or participated in the concealment of a massive price-fixing scheme engaged in by his client, the Plumbing Fixtures Manufacturers Association, in the early 1960s —so transcripts of conversations between him and the major PFMA conspirator indicate.

Lawyers bristle when either their legal techniques or their client's conduct is criticized. That, they say, is only for a court to judge. Ray Garrett Jr., a past chairman of the SEC, argues that "the romantic hero of our profession is not the one who fought for what he believed in, for that would be easy, but the one who fought for his client. Too

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Worst of the Worst

In February 1956 a lawyer for the Superior Oil Co. of California, seeking passage of a bill to free natural gas rates, left $2,500 in cash with Sen. Francis Case (R., S. Dak.). Case promptly exposed the incident and President Eisenhower vetoed the bill because of such "arrogant" influence. In 1971 lawyer-lobbyist Nathan Voloshen was convicted of fraud and perjury by using Speaker John McCormack's office on behalf of private clients. At a conference of corporate general counsels at Northwestern Law School in 1971, Mobay Chemical Corporation lawyer Robert Finch told the writer, "I've seen Pittsburgh law firms give envelopes with cash for delivery that day to the Sheraton [Hotel] for pickup by a Washington lawyer to grease the bureaucratic wheels." Was it perhaps just a retainer? "Hell, no; straight influence-peddling. That's not the way Washington law firms collect their bills."

Lawyer illegality, however, need not hurt one's business. Within a month after former SEC Chairman G. Bradford Cook admitted that he had repeatedly lied under oath about the Vesco case, he announced he would open his own Washington law firm to represent corporate clients and to "act as a liaison for other law firms that don't have Washington offices." Richard Kleindienst, the former Attorney General who was convicted of a misdemeanor for not telling the full truth to the Senate Judiciary Committee, recently earned $250,000 for five hours of counseling to an insurance company seeking to obtain business from the Teamsters union.

M.G.

much conscience on substantive matters is unprofessional."

Those who instigate or pass judgment on lawyers invariably confront a repeated litany of arguments:

It is up to the adversary system, not the lawyer, to uncover the truth. This is largely true where the adversary system exists, but in Washington the adversary process is more the exception than the rule. Corporate lawyers "descend like locusts" upon the regulation agencies in the phrase of former FDA Commissioner James Goddard; whereas opposing consumer lawyers make only an occasional appearance. Public-interest lawyers have established themselves as an important legal presence in Washington and have won some significant victories; but it is important to realize that, according to a survey conducted by the Corporate Accountability Research Group, they number about 190 and operate on a gross budget of $13 million annually, whereas 11,500 private attorneys earn some $307 million a year.

In Congress, the absence of any formal adversary system is obvious. A word whispered in the appropriate ear is more the custom than a reasoned exchange between competing advocates before a legislator. Thousands of corporate lobbyists, often lawyers, patrol Capitol Hill corridors to spot hostile legislation. Union or citizens' organizations simply lack the resources to look at more than a small fraction of the 15,000 bills introduced in Congress each year. The members themselves can barely keep up with the deluge of work and requests that cascade over their slender staffs. "If you aren't independently wealthy," complained ex-Rep. Allard Lowenstein,

> you can't have a staff that is capable of putting things together much beyond what you can come up with from the sources available to everyone—the executive departments, the lobbies, the staffs of Congressional committees, the Library of Congress. That's one reason why the lobbies are so influential. They have people who are able to spend all their time collecting data on why pollution is good for River X. What Congressman can match that?

It is guilt by association (what Edward Bennett Williams calls "guilt by client") to tar a lawyer with the views of his client. Thus, when the ACLU defends Nazis or Communists from unconstitutional infringements, it is wrong to perceive the lawyer as endorsing his clients' policies; rather, he or she is upholding constitutional safeguards due any citizen.

Yet this contrasts with a corporate lawyer who, on a *continuing* basis, advises his client not merely on constitutional safeguards but also on policy matters. As Lloyd Cutler has written, the Washington lawyer "is not limited, as in the courts, to defending what has already occurred. He has the opportunity of advising his client what ought to be done—how best to accommodate its practical problems to the emerging demands of the public interest." What if the client ignores its lawyer's counsel, or what if the lawyer advises not what ought to be done but what the client can get away with? It seems illogical to criticize, say, a corporate polluter, while at the same time forbearing to criticize the Washington lawyer whose perennial strategies may permit the pollution. After years of representing only corporations, "advocacy of one interest necessarily entails the neglect of or opposition to other interests," Rep. Abner Mikva has argued, "and [a lawyer] cannot escape the social, political and economic consequences of his choice."

For example, Charles Rhyne—Washington lawyer, once a classmate of Richard Nixon and more recently Rose Mary Woods's attorney—deplores the tendency to identify lawyer and client. Yet adorning his office wall is a Herblock cartoon depicting the Supreme Court's *Baker* v. *Carr* decision that established one man-one vote—a case Rhyne won. One doubts that he would similarly publicize his corporate clientele or the city of Richmond when it moved to block a black majority by annexing a suburb. "But lawyers cannot have it both ways," writes critic David Riley. "Either they are to be associated with the merits of their client's case, or they are not. Rhyne is not the only lawyer who appears not to mind the association when it is favorable."

As Thomas Austern said to a critical law student, "would you represent Sirhan Sirhan?" This analogy, like the one to the Kinsey Report, is convenient, but, again, basically misleading. A criminal or political defendant is often alone, impecunious, without political contacts, and subject to victimization unless stoutly defended. General Motors has more assets than most countries and cannot be similarly outclassed or victimized by a government it can influence in numerous ways. A single lawyer can be the *sine qua non* to an indigent defendant; a single lawyer is usually inconsequential to an IBM, which inundates teams of inhouse and outside counsel with problems. The former risks all in a criminal proceeding; the latter can lose five, or fifty cases in a row and still exist, if in less affluence. Indeed, a lawyer performs a more critical role

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in a criminal proceeding, where a person might lose his liberty (which is why lawyers are constitutionally required in felony cases) than in a civil proceeding, where property may shift hands between two well-off adversaries. Also, there is a significant difference between a lawyer who just once represents an individual accused of a violation and a lawyer who on retainer represents a corporation that is repeatedly in legal trouble.

A job shuttle runs between the law offices and the offices of government. One attempt to slow it down was undertaken by the District of Columbia Bar's Legal Ethics Committee, chaired by Hofstra Law School Dean Monroe Freedman. His draft Opinion No. 19 said that if a private lawyer were disqualified from handling a case because he or she had "substantial responsibility" on the case while in government, the entire law firm should be disqualified.

This reasonable suggestion shocked and divided Washington lawyers as has no issue within memory. "I've never seen anything like it," says Freedman. "It's been intense. It takes the form of submissions to the committee—we've never had this extent of submissions—and a great deal of personal lobbying." Law firms convened in emergency sessions; debates between proponents and opponents were held before jeering attorneys. The Federal Bar Association and chairmen of the SEC and FTC ridiculed this blanket approach, all arguing it would frustrate the flow of lawyers between corporate law firms and the government. Even the Washington Council of Lawyers, a progressive offshoot of the major bar association, dissented from the proposed rule, arguing that "such a narrowing of employment opportunities for attorneys leaving government is to make entering government service less attractive." The critics urged that if the rule were to apply, at least there should be a "waiver provision" allowing a law firm to handle a matter in controversy if the attorney with the conflict were "screened" from his colleagues.

The opposition was led by Lloyd Cutler, who protested that "the trouble with the rule is that it is so sweeping" and "would be as harmful to the government as to the law firms." Prior to one Ethics Committee meeting, Cutler asked Freedman if he could send a representative to argue the law-firm position. "So at the next meeting, not one but two representatives of Lloyd Cutler showed up," recalls Freedman, "both from the Justice Department, and one was an assistant Attorney General of the United States! When Lloyd Cutler sends a representative, he sends someone from the Justice Department! That, it seems to me, illustrates the unwholesome relationship—or interrelationship—between the law firms that represent those who are regulated, and the government agencies that do the regulating."

Ralph Nader believes that the opposition "unrealistically assumes that many government attorneys will have so many areas of substantial responsibility that they will have difficulty obtaining later employment with certain large Washington firms which operate in their specialty and possess certain clients." And if some very large firms should decide to hire fewer lawyers out of government, then more lawyers will join faculties, smaller firms or, even, public-interest firms. To Freedman, the issue was clear: what is unethical for one member of a firm is unethical for the firm in which he or she works and profits—and no screening mechanism could realistically quarantine the firm lawyer who has the conflict. Nor, argues Freedman, should the government agency involved grant a waiver, since the agency officials themselves have a conflict. They know that their rulings establish precedent for the day *they* may be seeking waivers as private attorneys.

Though those voting on the Ethics Committee favored the opinion, 8 to 7, it failed to pass in early 1977, because a majority of the nineteen-member committee was required; four members did not vote. Undaunted, Freedman has referred the issue to another bar committee which will reconsider the proposal as an amendment to be added permanently to the Code of Professional Responsibility.

Joseph Califano, former Washington corporate lawyer and now HEW Secretary, thinks it entirely appropriate to say "no" to clients whom a lawyer considers anti-social. He says, "We must assume moral-responsibility-by-association." The responsibility is a function of impact. Advocacy by corporate counsel can affect millions of citizens beyond the immediate client. Lawyers cannot view themselves as does Harry Caul in Francis Ford Coppola's *The Conversation*. Harry, who wiretaps for a fee, consistently maintains that he is a mere technician, paid to do a job but not to get involved in what happens after he delivers the goods—until, one day, he realizes that an assignment might lead to the deaths of two innocent people. Harry, like many lawyers, lacked a sense of consequence.

This does not mean, of course, that all client confidences should end up being published in the *Federal Register*, but it does mean that it is a legitimate enterprise for reporters to investigate lawyers more intensely. Or for law students collectively to ask law firms about their practices and ethics before being interviewed for and accepting positions. And it does mean that individual attorneys—free to decide what to do with their own professional lives—can reject corporate clients. Lawyers can make their own moral judgment about whether and how to represent clients, based on a sliding scale of considerations: for example, is the proceeding civil or criminal, nonadversarial or actually adversarial, abusive of judicial procedure or not, concerned with an alleged past or continuing violation? After weighing factors like these, an attorney may choose to represent such firms, and to accept responsibility for the continuing results; but he or she is also free to say "no." For there is nothing in the Code of Professional Responsibility that says a lawyer must represent the House of Morgan or G.M. Even the Canons of Ethics say, "He has the right to decline employment," and "If a client persists in . . . wrongdoing, the lawyer should terminate their relation."

Ultimately, a lawyer's personal standard of politics and morality may simply dissuade him from spending his talent on behalf of Colgate-Palmolive or Kennecott Copper. One is reminded of Felix Frankfurter's comment on John W. Davis, the great corporate lawyer of the first half of the 20th century. He was "a man of great ability," wrote then Professor Frankfurter in 1929, "but what's he done with it? What meaning has he?" □

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MR. CARTER GRASPS THAT NETTLE

MARK A. BRUZONSKY

Washington

In March, first during a press conference and then at a Clinton, Mass. town meeting, President Carter outlined what soon may evolve into a major new American initiative for a Middle East settlement. Carter's three-point program includes near-total Israeli withdrawal to the 1967 borders; establishment of real peace, including special security arrangements for Israel, and creation of a "homeland" for the "Palestinian refugees."

The administration's vision of an eventual Arab-Israeli settlement was jolting to all, but especially to the Israelis. Israel had not been under the illusion that Carter was going to live up to the excessively pro-Israel rhetoric of the campaign, but it hardly expected so forceful, hasty and *public* a discussion of the Palestinian issue and the simmering dispute over borders. After less than two months in the White House, Carter almost casually unveiled a far more comprehensive picture than any of his predecessors had drawn of U.S. policy in the area. And, though the various Arab parties are still waiting with growing anticipation for actions, it appears that the President is pointing the United States down a path first outlined in the Brookings Institution Report, "Toward Peace in the Middle East," released in December 1975, after considerable controversy among the report's sixteen signatories. Indeed, Israeli Ambassador Simcha Dinitz was active behind the scenes in late 1975, trying to convince a number of prominent American Jews on the panel to withhold their support. His failure at that time foreshadowed last month's developments.

So far, Israel's nervous response has been all too predictable. Though press spokesman Avi Pazner at the Washington Embassy does his best to play down the atmosphere of acute anxiety, Israel has begun a new "information drive." This campaign was announced by Prime Minister Yitzhak Rabin, who last week was forced to resign because of his financial improprieties, immediately after Carter showed his cards. It is designed to convince American public opinion—and Congress, of course—that Israel both deserves and requires "defensible borders" substantially enlarged from those of June 1967; that the "Palestinian problem" must be solved within the context of Jordan; and that the Palestine Liberation Organization (PLO) can never be a legitimate participant in Middle East negotiations.

Most observers of the Israeli scene believe that there will be no fundamental change after the May 17th Israeli election. Israeli foreign policy is determined these days more by circumstances and American pressures than by personalities and ideologies. The Labor Party—now headed by the more colorful Shimon Peres—might be able to substitute partners in the Knesset by replacing the intransigent National Religious Party with Yigal Yadin's new Democratic Movement for Change, thereby gaining at least some degree of flexibility to deal with both the Arabs and the Americans. Indeed, a coalition government with Peres at its head, Yadin pressing for electoral reform, Yigal Allon as Defense Minister and Abba Eban as Foreign Minister offers some attractions. But in all likelihood the coalition framework will continue to force upon Israel a reactive policy rather than an assertive one. The *Jerusalem Post* correspondent, Asher Wallfish, writing in the April 2nd issue of *The Nation* (before the recent Israeli developments) concluded that "one prediction is sure: the next government will be feebler than the present one." While Peres will probably prove a more popular campaigner than Rabin, it remains likely that Labor will emerge limping from the election.

Already the potential flexibility of the next Israeli Government has been somewhat diminished by Moshe Dayan. His recent threat to bolt from Labor caused such panic that important party leaders reversed their February platform decision and agreed that, before any territorial concessions are made in the all-important West Bank, new elections will be called. This is the exact demand by the right-wing elements after the December 1973 election. The independent newspaper *Haaretz* reports that Dayan's move will surely have a "negative effect on the freedom of political action of the next government" further paralyzing even the Labor Party.

After May 17, it is widely assumed, U.S. policy for the Middle East will aim for a serious reconvening of the Geneva Conference. *The Washington Post* candidly editorialized earlier this month that "If the Israelis can produce only another weak and diplomatically shackled government, they are going to find Washington designing their security interests and negotiating positions." Those skeptical that the neophyte Carter administration would attempt a comprehensive Middle East settlement—even one to be implemented over a period of years—have now become skeptical of their own skepticism. Even so, chances for actually achieving a Middle East peace remain slim, while the dangers of a breakdown of the Geneva talks are ominous.

Edward R.F. Sheehan, a Middle East expert at the Harvard Center for International Affairs and author of *The Arabs, Israelis, and Kissinger*, applauds Carter's initiatives but puts the odds against success at 3 or 4 to 1. And former Under Secertary of State George Ball, in a much-publicized *Foreign Affairs* article advocating a U.S.-imposed settlement, warns that

> nothing could be more reckless than to regard the projected Geneva Conference as merely another episode in the long-playing Middle East movie serial. It will be a high-risk venture with success or failure propelling the principal participants toward either relative stability or almost inevitable war. If it ends with a whimper—as it will in the absence of a decisive American initiative—it will be followed by a bang.

Roadblocks to success have been set up by the various

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Arab parties as well as by Israel. No Arab party has as yet accepted the kind of peace Carter has outlined, though Egyptian President Anwar Sadat has come far in his talk of "permanent peace" and "normalization" of relations. The Palestinians, as represented by the PLO, have yet to accept Israel in any form, though their willingness to contemplate a West Bank-Gaza Strip Palestinian state has in it an element of de facto recognition.

Carter's apparent determination to bring about a complete and total peace and to distinguish between Israel's sovereignty borders and its security borders is bound to create at least some tension in U.S.-Arab as well as U.S.-Israel relations. In short, a political mine field lies ahead and the United States appears to be heading into it partially blind. It is a major gamble with serious domestic as well as international ramifications, but it is being attempted because really there is no choice. If the role, in Carter's words, of "catalyst to bring about their ability to negotiate successfully with one another" should fail, a much more forceful approach may well be required, along the lines outlined by George Ball.

For some, Carter's Middle East vision is but one manifestation of what has come to be termed "Open Mouth Diplomacy"—more a public relations show than serious policy formulation. But others there think the new President may have been underestimated after all. Disclaimers notwithstanding, Carter and his National Security Adviser Zbigniew Brzezinski seem determined to do whatever is needed to break the Middle East stalemate—which has become intolerable for U.S. interests.

Both Brzezinski and William Quandt, his Middle East man at the National Security Council, played important roles in formulating the 1975 Brookings Report—that consensus statement on American Middle East interests and how peace might be nurtured by American diplomatic intervention. Earlier that year, Brzezinski, then still on the Columbia University faculty, had advocated creation of "what would probably be the PLO-dominated state of Palestine." Quandt's background is that of a scholar, one of whose major interests is Palestinian nationalism. And the Brookings Report itself clearly calls for recognition of "the principle of Palestinian self-determination." So it should have been no great surprise when this administration began to discuss a Palestinian "homeland"—a concept which of necessity means Israeli withdrawal from almost the whole of the West Bank and some special arrangement for sharing a nonbarricaded Jerusalem.

Carter spoke in Clinton on the evening of March 16. The next day a hungry press descended on the State Department, where reporters were denied any interpretations. Instead, they were told that the President was "extraordinarily well briefed" on Middle East issues and that his statement the previous evening "represents the cohesive and complete position of the United States Government." That was a rather bold assertion, certainly cleared with Secretary of State Vance, that those who would belittle Carter's sophistication, or the coherency of his administration's foreign policy making, do not understand how this President and this administration operate. Since then *Newsweek* has reported that Carter spent "hours of discussion" with Brzezinski and Vance, putting together this "major revision of U.S. strategy."

A few days after Clinton, *The New York Times*

Secretary Vance Greets President Sadat at Andrews Air Force Base

hailed President Carter's performance as a "wise policy" and "a fair vision of the American purpose and method in the Middle East." According to the *Times*, "there is nothing makeshift or accidental about the policy he intends to pursue." Other editorial comments, with noticeable exceptions such as that by columnist Joseph Kraft, ranged from favorable to enthusiastic.

It is doubtful we shall be hearing many more specific promptings from the Carter White House as the Israeli election approaches. Washington was hoping for Rabin's continuance, but still would much prefer Peres to a right-wing Likud coalition, which has become possible though unlikely. Further nudges from America at this time could undermine Peres and even force him to make uncompromising campaign promises—something about which Carter should be most sensitive.

During President Sadat's Washington stay, Carter made few comments that added to his previous statements. The same approach is likely later this month when Jordan's King Hussein is expected. By late May, when Saudi Arabia's Crown Prince Fahd comes to call on the new President, it is possible that the administration will resume its public discussion of Middle East matters. Carter will also be meeting in Europe next month with Syria's President Hafez Assad.

With this period of more traditional diplomatic consultations coming up it is useful to recall in some detail what has already been said, keeping in mind that the United States has committed itself to a major push for a Middle East compromise before the end of the year.

Carter's vision is essentially one of an Israel at peace with all its neighbors, including Palestinians occupying

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a "homeland" in the area of the West Bank and Gaza Strip—territories occupied for the past decade by Israel, but whose political future has never been resolved. The "first prerequisite of peace," the President said at Clinton, requires Arab acknowledgment of Israel's right to exist. He has in mind gradually establishing normal relations between Israel and it's neighbors. He foresees a situation where interaction would be "opened up to travel, to tourism, to cultural exchange, to trade, so that no matter who the leaders might be in those countries, the people themselves will have formed a mutual understanding and comprehension in a sense of a common purpose to avoid the repetitious wars and death that have afflicted that region for so long."

The borders Carter envisions are, with "minor adjustments," essentially those that existed before the 1967 Six Day War. The State Department has let it be known that the United States would consider a continuing Israeli control over all of Jerusalem a "major" change and therefore unacceptable, but Carter has tactfully refrained from commenting on this most emotional issue. He has, however, distinguished between Israel's "sovereignty borders" and what might be its "security borders," at least for some period of years. This might involve the creation of demilitarized zones, introduction of international peace-keeping forces, and even the possibility of Israeli military patrols within territory that would revert to Arab sovereignty—at least while any agreement is being implemented.

For many, the most significant of Carter's Clinton remarks was his call for "a homeland . . . for the Palestinian refugees who have suffered for many, many years." While the Israelis officially have begun once more to insist that Carter means only a Palestinian area within Jordan, a more impartial assessment is that this administration has not yet decided just what form such a "homeland" should take. Prime Minister Rabin said, when questioned about the "homeland" statement, "I'm afraid Carter doesn't have [Jordan] in mind."

At the moment the intention in Washington is to promote a degree of ambiguity which, while it puts the parties on notice, publicly allows them to make their own interpretations. What specific proposal the United States will soon decide to promote remains uncertain, much depending on how the Palestinians respond during the next few months and on the preparations of inter-Arab diplomacy for Geneva. The Carter administration has definitely kept its option to advocate a sovereign Palestinian state. Since Clinton, Carter has been quoted as saying that the Palestinian problem will have to be resolved within "the framework of the nation of Jordan, or by some other means"—another attempt to create as much ambiguity as possible, since "some other means" can refer only to a separate Palestinian state, possibly linked to Jordan in various ways.

Carter's Middle East package is both comprehensive and well conceived. As the *Times* editorial put it, his outline is one of "real peace, real withdrawal and a real solution to the problem of the Palestinians." Former Secretary of State Kissinger's attempts at step-by-step diplomacy may have prepared the way for this bold move to resolve the fundamental issues between Arabs and Israelis, but Carter has taken the first major step toward asserting U.S. leverage upon all parties to the dispute.

By doing so, he has also raised the sensitive issue of American security guarantees for Israel—in effect the glue to hold any comprehensive settlement together while the parties adjust to new realities. Such guarantees could be one of the ways Carter thinks Israel's security frontiers could be extended beyond its sovereignty borders. The United States, for instance, might agree to monitor and patrol demilitarized zones in the Golan Heights and West Bank, enlarging on the role it now plays in the Sinai passes from which Israel reluctantly withdrew in 1975. Indeed, during his February visit to Israel, Secretary Vance discussed in general terms the possibility of American guarantees. And in an interesting Congressional development, Rep. Clement Zablocki, chairman of the House International Relations Committee, told a meeting of the Zionist Organization of America that he now favors "a formal security commitment between the United States and Israel, duly ratified by the Senate and binding in all its terms."

As with the British Balfour Declaration's call in 1917 for a "Jewish national home," Carter's assertions to date merely acknowledge the existence of a Palestinian people who deserve some form of self-determination. It is the form that remains in question and it will be shaped in large part by the behavior of the Palestinians themselves. Unless they can make changes in the liberation-oriented Palestine National Covenant (a quasi-constitution), the Israeli hold on U.S. policy, coupled with Carter's determination to foster a real peace, may well prevent any further gestures by Washington toward the idea of a separate Palestinian state. But if Palestinians at some future time should alter the ideological base of the PLO, it is possible—even likely—that the United States will finally acquiesce in inviting that body to represent the Palestinian people in Geneva. Morton Kondracks, the new executive editor of the pro-Israel weekly, *The New Republic*, suggested last month that "The conflict between Israel and the U.S. could well come . . . over just how much change is to be demanded of the PLO before it is accepted as a party to negotiations."

But it is clear even now that the administration perceives the Palestinian dimension of the Arab-Israeli conflict to be more significant than did any of its predecessors. In a little reported development, Robert Lipshutz, a senior Presidential counselor who serves informally as liaison with the Jewish community, may have thrown a little more light on the attitude of the White House toward the Palestinians. Speaking just days before Carter's Clinton appearance, Lipshutz noted that "a large percentage of the Palestinian people feel they have been deprived of their rights and, whether such an attitude is justified or not, we would ignore this situation at our peril. The resolution of this problem," he continued "is of utmost importance to the state of Israel, to the Arab countries, to the United States and indeed to the world."

Positive public and press reactions to Carter's Middle East views are further stimuli to the administration's determination. Even before Clinton, reaction to the President's press conference comments about a comprehensive Middle East peace requiring Israeli withdrawal

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to approximately the 1967 "sovereignty" borders were surprisingly favorable. "Some of the President's ideas should prove valuable . . .," *The Christian Science Monitor* noted on March 10. The following day *The Washington Post* observed that, though "much remains to be learned about the Carter approach, . . . the plan seems to us extremely promising and sound. . . . We think," the *Post* continued, "that Mr. Carter is right to make a bold Mideast initiative and that his effort is serious and fair and deserving of the most responsible consideration. . . ." *The New York Times* agreed, declaring that "President Carter has now cut through this tangle with a shrewd and prudent formula for negotiations. . . . If the Carter formula is not recognized eventually as the essential framework for negotiations, there would be little point in talking." The White House will be closely following future press reactions to its Middle East positions, always aware that the Ford-Kissinger "reassessment" in early 1975 failed precisely because forces opposed to it were able to use public and Congressional leverage to block administration moves.

But during the two years since the "reassessment," many perceptions have been changing. Now something of a new consensus is jelling throughout the country, and especially in Washington, about what to shoot for and how to proceed in the Middle East. Geneva will be the public forum, but much will have to be worked out beforehand in confidence. The agenda will largely be territorial withdrawal and Palestinian "homeland," in exchange for peace and security. "We see potential progress in 1977," the President commented on March 25. "I believe our country is willing to devote a great deal of attention" to Middle East diplomacy.

Whether the administration and public opinion will march together during the coming months is now one of the big questions. As in December 1969, when former Secretary of State William Rogers publicly discussed a U.S. initiative for breaking the Middle East deadlock, Israel is again attempting to short-circuit America's influence. A major and possibly traumatic policy reassessment is in store for Israel after the May 17th election, but for now the Israelis have decided to compete with the administration for public and Congressional opinion —and in this there is more than a touch of *déjà vu.* Within the American Jewish community attempts to silence and discredit those who support the notion of a Palestinian state and Israel's return to the 1967 borders have become excessive and distasteful. As never before in recent memory, the community is in danger of political fragmentation should there be a confrontation between Israel and the United States on these issues.

Carter has a chance for success only if he can hold together public, press and eventually Congressional support for the Middle East course he has charted. Only thus will he be able to withstand the inevitable domestic political pressures. By one account, every single Middle East document the President has received through the bureaucracy insists that "the problem of Israeli intransigence" will be the greatest obstacle he must confront in pursuing the kind of comprehensive settlement he has outlined. And George Ball is right to warn in his analysis that Israel's attitudes will be translated into American domestic politics, as happened during the campaign. "President Carter must be prepared to accept formidable political opposition," Ball writes. "That will not be easy, for in the years since [1957] Israeli supporters have greatly increased their political power in Washington." Still, Ball continues,

> If America should permit Israel to continue to reject inflexibly any suggestion of a return to earlier boundaries and the creation of a Palestinian state and to refuse even to negotiate about Jerusalem, we would be acquiescing in a policy hazardous not only for Israel but for America and the rest of the world. That would not be responsible conduct for a great power.

Months of political maneuvering lie ahead. A bruising confrontation between the United States and Israel is near unless one of the parties alters course. Yet real and lasting peace can be built only upon a solid and trusting American-Israeli relationship. □

DEAD LAWS AND DEAD MEN

Manslaughter in a Coal Mine

HARRY M. CAUDILL

In March of 1976, a series of explosions in the mine operated by the Scotia Coal Company under Big Black Mountain in Letcher County, Kentucky, killed twenty-six men. The disaster was predictable, and when it was not predicted it became inevitable. Though by no means the worst tragedy in the history of coal mining in the United States, it was perhaps the most foolish.

Americans hug to themselves the comforting myth that their country leads the world in virtually all respects. Their cars are the roomiest and most gadget-laden, their homes the largest and most comfortable, their research programs the most productive and, until 1974, it was smugly assumed that their energy sources were amplest and least vulnerable. In a warm, expansive moment Lyndon Johnson once referred to America as "the richest and most powerful country in the history of the world." In reality such effusions of consoling rhetoric conceal the harsh fact that in some important respects the United States is a consistent laggard. In fact, when measured by well-established

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world standards, some aspects of our national life are shameful.

A shocking instance lies in the field of coal-mining safety. Under the best of circumstances digging coal is hard and ruinous work. Even strip mining, which now accounts for half the nation's output, takes its inexorable human toll. Bulldozers topple down the slopes of "spoil banks"; "highwall" rocks give way and fall onto benches; premature and delayed explosions hurl stones with cannonball force; loaded trucks lose their brake pressure on precipitous, winding roads. Such mishaps kill and maim workmen even in this segment of the industry, a segment that seeks to excuse its land-killing activities because it kills fewer men.

And in truth it is underground that coal mining reaches its deadly worst. In the long tunnels leading to the working areas, at the dust-choked "face" where machines rend the hard bituminous rock from the vein, and along the tracks and conveyor belts by which the fuel is carried to the outside, accidents occur with numbing frequency. The perils are legion. In the cramped confines of the mines the huge machines mangle bodies with the efficiency of sausage grinders. Roofs crash down despite wooden props and steel bolts. Poorly managed blasting snuffs out lives. Coal and rock dust suspended in the air that must be breathed cause slow strangulation from pneumoconiosis and silicosis. Most dramatic of all, methane gas can seep from the coal veins and blow up with a violence approaching that of gunpowder.

For most of the nation's history its coal mines operated in remote areas, received little attention from lawmakers and the public, and derived such safety standards as existed from feeble state mining bureaus and the well-sheltered consciences of mine owners. The former were always short of funds and routinely staffed by persons "friendly to the industry"; the latter could rarely abide safety procedures because they cost money and cut into profits. Consequently, miners died in small numbers, and large, crippled ex-miners limped along the streets of coal towns; by 1968 nearly 250,000 men were gasping, half-dead victims of pneumoconiosis, and half as many more had already been sent to inconspicuous graves by the same deadly ailment. A hundred thousand had died in mining accidents since the industry began.

Then on November 20, 1968 Consolidation Coal Company's mine at Fairmont, W. Va., blew up, killing seventy-eight men. There had been deadlier mine catastrophes in U.S. history—362 miners died at Monongah, W. Va., in 1907—but it was spectacular and television played it to the hilt, startling millions of viewers with the immense eruptions of black smoke that roared from the pit-head and drifted over the somber hills. The Governor rushed to the scene, to be photographed looking solemn and sympathetic, and used the opportunity to point out that mining is inherently dangerous, but that Consolidation had an unusually fine safety record. W. A. Boyle, then president of the United Mine Workers, mouthed similar nonsense. "Consol" was part and parcel of the U.S. coal industry, its largest producer and general pace setter, and it shared fully in the industry's disgraceful casualty figures.

Sen. Harrison Williams of New Jersey took the lead in drafting and enacting legislation designed to prevent similar calamities. The Appalachian mining states were represented by influential legislators who might have been expected to initiate this legislation. But coal companies are so powerful in West Virginia, Kentucky, Virginia, Tennessee, Pennsylvania and Alabama, and coal miners and their families are so politically inert, that the elected Representatives from the region deemed it the better part of valor to leave the work to other hands. In any event, the time for a new law had come. The Federal Coal Mine Health and Safety Act of 1969 entered the U.S. Code, and two extremely reluctant Presidents—first Nixon, then Ford—took up the task of implementing it. The Mine Enforcement and Safety Administration (MESA) was created and charged to enforce the new safety code.

The voluminous and detailed safety requirements are laudably sound and reflect a desire on the part of Congress to introduce into U.S. coal operations essentially the same procedures, techniques and devices that have worked so well in Western Europe since 1950. The Act's principal weakness lies in the immense amounts of red tape that must precede the imposition of punishments for noncompliance, and the trifling extent of those punishments when actually levied.

Thus for the first time the federal government undertook to rein in and civilize the vast, fragmented, widely dispersed and still ideologically laissez-faire coal industry. Largely centered in Appalachia, where individualism and distrust of government are rampant, the industry's managers fully reflect these attitudes—and so do their employees. The chaotic conditions within coal can be measured by a comparison of fatality ratios per million manshifts worked underground in the ten years following World War II. Bear in mind that European mines were ravaged by that war, while U.S. mines were ravaged only by mismanagement and lack of foresight.

In Great Britain the death rate ranged from 0.44 in 1947 to 0.24 in 1954. In Belgium it declined from 0.66 in 1947 to 0.32 in 1955. In France the rate dropped from 0.48 in 1948 to 0.34 in 1955. In West Germany the figures went from a high of 0.77 in 1948 to 0.61 in 1955. In Holland, which almost certainly operates the world's safest pits, the fatality rate fell from a high of 0.53 to 0.15. In the United States during the same interval the high was 1.22 in 1947 and the low was 0.84 in 1952.

These data reflect a general unconcern with safety and lives that persisted with only minimal change through the Great Crusade, the New Frontier and the Great Society. That unconcern permitted the methane buildup along the miles of dusty, coal-black tunnels at Fairmont and culminated in the colossal explosion that roared with such deadly force under the West Virginia hills.

Gordon Bonnyman is 57, a slender man with restraint stamped in every line of his spare frame. He is one of the vanishing breed of American businessmen who have managed to hold onto inherited wealth and expand it for the next generation. The Bonnymans have left their everlasting mark on the torn and battered Appalachian landscape. The map reflects the names of their old operations at Bonnyman, Ky., and Bonny Blue, Va. Their new operations are conducted by Blue Diamond Coal Co. in the eastern Kentucky hills.

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Blue Diamond is controlled and largely owned by Bonnyman and his family, and they do not give out information concerning stockholders and dividends. But in 1976 *Forbes* magazine reported that in 1975 Blue Diamond had increased its liquid assets by $55.4 million, that it had in fact, enriched its treasury by $150,000 per day throughout a year that most Americans recall as the most depressed in three decades. Nor is there any reason to suppose that the cornucopia ceased to flow as spring drew near in 1976.

Scotia Coal Co., a wholly owned subsidiary of Blue Diamond, generated more than a third of the profits *Forbes* had found so remarkable. Operating in thick, hard veins of heat-rich metallurgical coal in Letcher County, Kentucky, its strip mines and endless outpourings of wastes have done much to ruin a once beautiful tributary of the Cumberland River. But this immensely profitable mine was not without serious problems. The stripping operation attacked only the forest-heavy outcrops of the veins; tunnels followed the coal thousands of yards into the immense ridge.

The 4,200 foot Big Black Mountain has the appearance of absolute stability, but it has known eons of torment. A few miles to the north lies the long parallel Pine Mountain, a product of violent crustal upthrust. The pressures exerted by these processes reached far into the depths of the much older Black Mountain, twisting and folding its coal veins and the overlying layers of slate and stone. When the company began driving its tunnels at Scotia on the Poor Fork it encountered troublesome "top conditions," while the sinks created by the undulating coal deposits produced severe drainage problems.

But the principal difficulty was the bane of coal miners —methane. To most Americans this is highly beneficent "natural gas," the product delivered by public utilities to millions of homes, offices and plants. But when it is encountered 4,000 or 5,000 yards inside a mine, at the end of a long, dark, narrow tunnel, a methane "seep" is an entirely different matter. If the concentrations are high enough, breathing the stuff can be deadly. If a spark from machinery or an illegally smoked cigarette sets it off, the blast can ignite coal dust. The ensuing explosion converts the tunnels into gigantic gun barrels through which surge almost incalculable heat and power. In these circumstances, friendly natural gas becomes a demon.

In March 1976, Scotia's operations were about typical of at least half the nation's soft coal producers. No one connected in any way with the management of the company displayed any visible concern for land, air or water. They regarded environmentalists as nuts. To them the United Mine Workers of America with its royalty-supported Health and Welfare Fund was anathema, and the federal program to compensate disabled black-lung victims was a "give away." The poor people huddled in the hollows were disdained. Watching University of Kentucky basketball games on television was their most coveted form of entertainment, and the overriding goal of right thinking people was to dig coal and make money. The miners on their payrolls shared most of these views, seeing nothing wrong with the arrangements per se, but inclining to the notion that they should collect larger chunks of the profit pie.

Their share was already quite good. To keep them from being lured into the UMW, Scotia paid wages substantially higher than those received at unionized pits. Wages began at $52 per light-hour shift for the lowest categories and went to $64 for skilled machine operators. There was plenty of overtime, which drew 50 percent more. Generally the men worked six days a week, and sometimes on Sunday. There was a cash bonus of 10 percent for those who missed no workdays in a month. Thus wages ran from $12,000 to $16,000 and a few miners with a lust for work and no regard for Sundays or holidays boasted of $30,000 in 1975. Fringe benefits were meager, but they were of little interest to Scotia's 400 miners, most of whom were young and expected that pension funds—including Social Security—would "go broke" long before they reached retirement age.

For all this munificence Scotia demanded one thing: coal. It must clatter through the tipple and fill the railroad cars all day and all night, shift after shift, irrespective of injuries, pneumoconiosis, bad weather or state and federal safety laws.

On March 9, 1976, the third shift began as usual. The solemn enactments of Congress and the state legislature, and the regulations adopted pursuant thereto, provide the manner in which a new shift of workmen shall take place and the precautions that must be observed for their survival. Such laws and regulations are sound enough, but what actually happened on that ill-fated shift demonstrates the leaden inability of state and federal bureaucracies to carry public mandates into effect.

Charlie Fields is a short, plump, red-faced man whose physical appearance betrays many years in the air-short, dust-abundant mines. His breath comes in the labored gasps of incipient emphysema and black lung. Ambitious beyond most miners, he improved his lot by studying for the "mining papers" of a foreman. Because of a meager education this had come hard for him, especially the meaning of engineering terms used in the state's written examination. But his perseverance and ambition were rewarded and Charlie was eventually employed by Scotia to "fire-boss" the third shift. It is clear that he took his duties lightly, but there is scant reason to suppose he was appreciably less conscientious than most of his fellows similarly engaged in the industry. Perhaps he simply failed to appreciate the seriousness of the task with which he, as a licensed foreman, was charged by law.

It is the duty of a fire boss or "pre-shift safety examiner" to inspect all working places and all haulways leading into them within a three-hour span before a work shift begins. He must see that air circulation meets the required norms and that roof conditions are safe. He is expected to detect fire hazards, including such obvious risks as spark-emitting machinery, improperly stored combustibles of all kinds, accumulations of coal dust and, most importantly and obviously, the presence of methane. The caged canary has long since disappeared and a methanometer now gives accurate readings of the percentage of the gas in the air. Methane becomes explosive at 5 percent and ceases to be explosive at 15 percent. Prudent supervisors are likely to empty a section when 0.75 percent methane is detected,

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the men being kept out until new airflows remove the gas.

At the official hearings held at the courthouse in the county seat two months later, it was made clear that Charlie Fields did not inspect that portion of the mine known as No. 2-Southeast Main, though he had entered in the log or journal that he had checked the area and that no gas was detected. When questioned by Robert Barrett, director of MESA on April 27, 1976, he admitted that the entry could have been erroneous. Someone had told him that the air was good and he had accepted that assurance as adequate and entered a notation that the ventilation was 14,300 cubic feet per minute at the last "open cross-cut" in the "straight" of 2-Southeast Main. That is an immense volume of fresh air, surely enough to dilute to harmlessness any methane it encounters.

Fields conceded that he rarely made any inspections, relying instead on a subordinate, Arvil Cornett, to do so. On the basis of Cornett's reports to him he then made the log entries that constituted the mine's official record. He had been to the straight of 2-Southeast Main only twice in six weeks, though he knew of a "gas feeder" in that inactive dead-end tunnel that emitted such volumes that concentrations had risen to at least 5 percent at one time. He did not recall reporting that discovery. He had been instructed by higher level management to sign the log routinely on the basis of Cornett's reports.

As for Cornett, he told the hearing officers that he too had failed to inspect the long section at the end of the heading because he did not expect anyone to enter it. Weeks earlier a branch tunnel had been drvien off at a right angle and "development work" was proceeding there. (This was done without advance notice to MESA, a serious violation of the safety code.) According to some miners who knew the area, brattices—barriers to shunt air from the fans to working places—had routed the oxygen to this new section, leaving 600 yards at the end of 2-Southeast Main temporarily abandoned and sealed off behind the brattice curtains. Even without these fixtures, air, following the line of least resistance, would enter the new section rather than push into the dead-end tunnel straight ahead. Thus the air in the idle length of tunnel was undisturbed as the days passed.

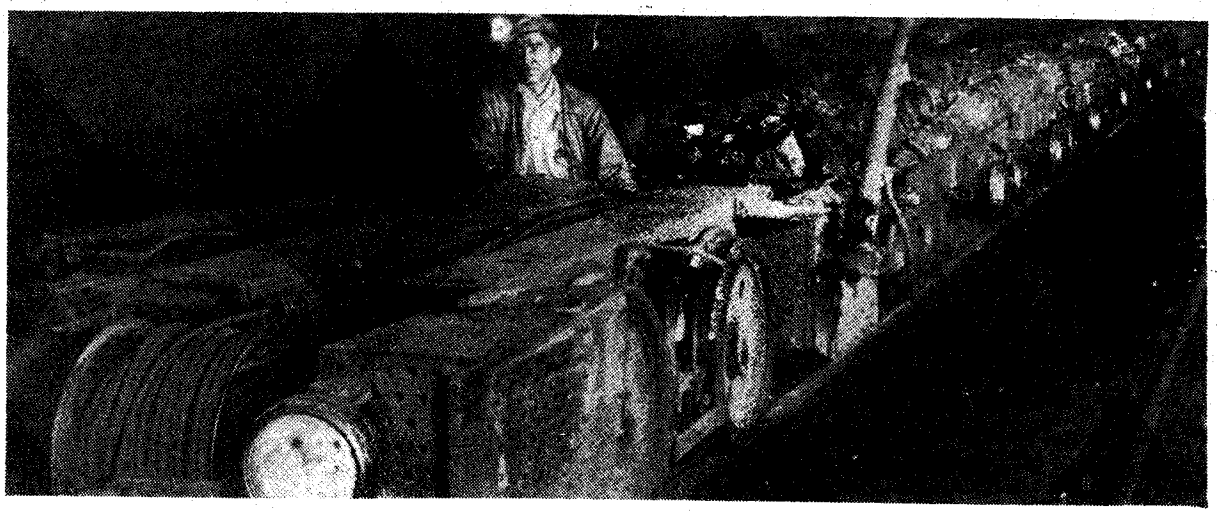
Then, on March 9, a crew from the third shift was directed to haul a load of track rails into the section, preparatory to bringing in a new "continuous miner." The inspection log showed the section to be free of gas and adequately ventilated, so two workmen blithely drove two electric locomotives, with their carloads of steel rails, into an area no methanometer had entered for at least a day and probably a month. Cornett noted that at the entry to the new branch tunnel he had found the air flow to be 10,120 cubic feet of air per minute, 30 percent less than was stated in the log. He had "heard rumors" of a methane feeder, but had not tried to track them down.

Just before the locomotive appeared in the area, problems had developed in the new working area, identified by the engineers on their maps as "2-left off 2-Southeast Main." The air was "bad" and there was "not enough" of it, according to miners, who said that Virgil Coots, the 23-year-old foreman, telephoned this information to James Bentley, ventilation foreman. Bentley, who had countersigned Charlie Field's log, denied that any such call was received, and testified that someone unknown to him and without authority to do so had opened an air-regulator 4 feet. When this happened, Coots called to say "he had lost it [the air]."

Two minutes later fifteen men died as an immense, booming ball of fire streaked out of the far limits of 2-Southeast Main, swept 1,800 feet to the entrance of 2-left off 2-Southeast Main, and flashed into it with a searing roar. The locomotives with the track layers had ventured into the long-deserted section and their arrival had set off gas accumulations that no one had bothered to suspect.

The Scotia mine had been inspected hundreds of times before March 9, 1976, and 652 violations of safety laws and regulations had been cited. Of these, at least sixty infractions dealt with serious ventilation problems, including insufficient air circulating at the working face, line brattices out of position, inoperative methanometers, failure to follow the ventilation plan, and findings of imminent danger of explosions, due to methane concentrations of 1.2 percent. Penalties amounting to $164,352 had been imposed by assessment officers, but the company had actually paid only $78,877.

Neither the mine superintendent, the general foreman



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nor the vice president in immediate charge of the operation regularly checked on the work of the fire bosses or made routine inspections on their own initiative. As one of them put it, "Everybody knew what he was supposed to do and we just left it up to him to do it."

As for Gordon Bonnyman, who lives 150 miles away in Knoxville, he said that he knew nothing of any safety violations. At the courthouse hearings he described Blue Diamond as "a small, informally structured operation" that ran three coal mines in Kentucky and clay and mica mines in North Carolina. His time was spent at the Knoxville headquarters and from his demeanor and testimony one could surely conclude that the goings-on in the tunnels under Big Black Mountain were as remote to him as the harvesting procedures in Bulgaria.

The haphazard management practices at Scotia were matched by the equally haphazard and erratic conditions in the regional and Washington offices of MESA. As soon as he heard the news of the explosion, Herschel Potter, chief of the Division of Safety for MESA in the region, proclaimed that "Scotia stands tall in the industry" in matters of mine safety; he then hied himself to the scene. There he met Robert Barrett, director of MESA, who had flown down from Washington with a covey of unimpressive looking "experts." After solemn conferences with company "management teams" and representatives of the anemic Scotia Employees' Association, a recovery team recruited from other mining companies brought out the dead bodies. It had not yet been discovered where the explosion originated or what had set it off, but coal production must go on "in these energy-short times" so, in the same shambling fashion, a crew was organized to go in and restore air circulation and rebolt the blast-weakened roof. This crew of men was accompanied by three MESA inspectors who were to see that the work was properly performed under the immediate supervision of foreman Don Polly. This time the "fire-bossing" was done by a MESA inspector and another company foreman. The former had no anamometer or carbon monoxide monitor. Incredibly, one of the workmen, P.D. Holbrook, was a machinist with absolutely no underground mining experience! The preposterous decision to include him in the crew was concurred in by MESA, the company, and the miners' "association." Toward the end of their shift a laconic notation was entered in MESA's log: "All O.K."

By then Barrett had flown back to Washington where, a few hours later, on March 11, he was confronted with the doleful news that another explosion had ripped out of that same deadly tunnel. This time eleven were killed, including all three of the MESA men.

Barrett and his experts reassembled at the gloom-and-doom shrouded mine where the lethargy at all levels had begun somewhat to dissolve.

A session of buck-passing and recriminations now ensued, as the company and the miners' association blamed MESA for the twin calamities, while the undaunted bureaucrats placed the entire responsibility squarely on the company.

At this point MESA began to formulate a theory to explain the blasts. It seems that one of the battery-powered locomotives, used to transport the steel rails into 2-Southeast Main, was equipped with pneumatic brakes instead of the usual manual type. A compressor automatically pumped up the pressure for these brakes at half-hour intervals, and each time this occurred it set off what was variously described as an electric "arc," "spark" or "flash." It was postulated that, when this machine was driven into the temporarily abandoned 2-Southeast Main section, the compressor ignited the accumulated methane. This kind of brake was a rarity necessitated by the uneven floor of the mine, so, quite naturally, MESA did not suspect its existence. The locomotive was still in the section, but the company did not inform MESA about the arc-producing mechanism, which would continue to function at half-hour intervals for weeks, until the battery was exhausted. Thus, the theory ran, MESA, misled by the company's silence, allowed the roof bolters and its own supervisors to enter a gassy pit in which a "possible ignition source" functioned every half hour. For a time this afforded MESA a tenuous escape hatch and it was clung to with the fervor of a drowning man holding to a life float.

Eventually the mine was sealed at all its openings to allow the air to "stabilize" and the battery to expire. It was reopened in July and miners working in oxygen respirators spent two months restoring brattices, pumping out immense pools of water, restoring electrical and telephone lines and shoring up the top. The bodies were reached and brought out in late November.

The Scotia explosions graphically illustrate all that is wrong with the nation's coal mines. Management is fascinated by the immense profits flowing from a bad and steadily worsening energy situation, and demands ever greater production. The gritty work of running the pits has been delegated to low-echelon foremen and superintendents of mediocre competence and, frequently, slight education. Top management avoids the tipples and tunnels and knows little about the guts of the operation. Management at the mine level delegates responsibility ever downward to foremen and sub-foremen, of whom there are seldom enough. For example, if Charlie Fields had lawfully "fire-bossed" the fatal third shift, he would have traveled more than 5 miles and stopped for inspections at dozens of working places, an obvious impossibility. The miners are hooked on high wages and resent any action that might cost them a shift. They are untrained for their dangerous work and few, even among the experienced, have any real understanding of the dangers they must encounter. In their ignorance on the one hand and greed on the other, they virtually court disaster. As for MESA, it is staffed with "experts" who know little more than the miners (from whose ranks they are recruited) and, like Herschel Potter, instinctively react in defense of the industry they theoretically police. And when a company increases its liquid assets by $55.4 million in a single year how can its anti-social propensities be checked by penalties totaling $78,877 or, for that matter, $164,352?

The corporation that drew such prompt encomiums from Potter had wholly omitted to educate its miners in safety procedures. Some of the men said they had

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never been shown how to put on a "self-rescue" respirator, designed to make survival possible in pits from which fire or explosion has removed the oxygen. They had been taught nothing about the geology of the mountain in which they worked and had no understanding of the nature of methane or the huge "kettle bottom" rocks that can drop with silent deadliness out of the roof. Methane escapes in increasing quantities as barometric pressures fall, but the mine did not even own a barometer. The mine had no rescue teams, trained to enter disaster areas and bring out survivors. It had never staged escape drills. The company did not keep an ambulance to carry injured miners to hospitals, the nearest of which was 15 miles away over a narrow and extremely winding road. When the men asked that one be bought, the company said it would put up half the cost, and the miners could pay the balance. Under these circumstances, hundreds of men were sent as far as 2.5 miles into a ridge that towered above their heads for thousands of feet, the twisted strata propped up on coal pillars and wooden beams, and strung together with tenuous steel bolts or pins. Such a ramshackle situation made catastrophe almost inevitable.

To a considerable extent the hearings into the March 1976, blasts were taken up with testimony of miners concerning the loose day-to-day operation of the mine. There were accounts of MESA-ordered ventilation curtains being routinely taken down during the working shift so as not to impede the passage of "shuttle cars," then rehung to impress inspectors expected with the fresh work crews. A continuous litany told of advance warning that MESA inspectors were on the way, whereupon all hands flew to making the mine passable. In such instances, it was reported, electrical facilities were quickly insulated, defective methane detectors were replaced, conveyor belts were cleaned up, and ventilation systems were put in order. Though company spokesmen denied it, some of the miners insisted that ventilation regulators were reset to keep bountiful air flowing in areas undergoing inspection, the excellent circulation accompanying inspectors as they moved from section to section. Meanwhile, stale air was the lot of the men whose areas had already met the eye of the "Secretary's representatives." This insidious and deadly game of cat and mouse continued, according to their accounts, right up to the fatal shift.

As it turned out MESA could not shelter for long behind a plea of ignorance concerning those arc-emitting brakes. At the agency's hearings Ben Taylor, chief of the Whitesburg district office, admitted that a foreman had told him about the brake compressor and that he knew it generated an electrical arc. He discussed this with William Clemons, his superior, but Clemons dismissed the idea as unimportant. Neither mentioned the information to Robert Barrett, a newcomer to the position and a conscientious man, who sadly noted that he would never have authorized the roof-bolting crew to enter the mine if he had known of the compressor.

The two miners who survived the second explosion tesitfied that the "MESA men," the foreman and some of the miners discussed the compressor and its periodic electrical arcing as they went into the mine, agreed that it could ignite still another blast, and then with the innocence of children playing with a cocked and loaded .45, proceeded straight on to a fiery death a few hours later.

Neither Taylor nor Clemons had ever received any significant training in mine rescue work, and after the first explosion properly trained mine-rescue teams from nearby Bethlehem Steel and U.S. Steel operations had to be called in to bring out the fifteen bodies, this task being beyond the capacity of MESA and Kentucky's pitiable Department of Mines and Minerals.

This was too rich a field for Congressmen to avoid and in due time a hybrid group of Senators and Representatives came to Whitesburg for hearings. Chaired by Rep. Carl D. Perkins of the House Committee on Education and Labor, they spent six whole hours on a tragedy that had snuffed out twenty-six lives. They fulminated at the MESA personnel, solemnly and respectfully slapped the wrists of company spokesmen, and poured out immense flows of sympathy on the widows, orphans and other relatives of the dead who filled the chamber. As the hearings adjourned one of the widows said with a disconsolate shrug, "You can see from what went on here why people ain't got no faith in Washington nowadays."

No foreman was indicted or punished for neglect of duty. Thirteen months later no charges had been brought against Blue Diamond Coal, Scotia, Gordon Bonnyman, the MESA bureaucrats or anyone else. Twenty-six men died under circumstances that reek of carelessness, lack of skill, illegality, incompetence and official neglect, but no noteworthy changes have been induced by the tragedy. The same stockholders own the mine, which is operated under the same management and supervisory personnel. The surviving miners, their ranks fleshed out with eager new recruits, go on as before. The MESA personnel still come round on inspection tours and have issued more than 500 new citations for safety violations since those fatal days in March 1976. If sleepless nights have been endured it was because of profits lost during the months when the coal vein was sealed, not because outraged justice demanded retribution.

A fantastic footnote must be added to this incredible story. After work resumed in the mine, the safety committee of the miners' association discovered some underground workmen smoking cigarettes, an act forbidden by both state and federal law. When the company fired them for thus endangering the lives of all and sundry, their fellow workmen struck to show their sympathy and support. Eventually the safety committee and mine management yielded and the smokers went back to work with the strong approbation of their "brother miners."

Because of the large-scale shift to Western strip mining, the mortality rate in U.S. mines was down in 1976 to 0.41 per million man-shifts, only about three times the casualty rate experienced in the mines of Holland twenty years ago. At this rate about 150 miners will die each year and another 11,000 will be injured. □

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UNDERCUTTING *MIRANDA*

THE BURGER WAY WITH SUSPECTS

ALAN BERLOW

On March 23, the Supreme Court overturned the conviction of Robert Williams for the brutal murder of 10-year-old Pamela Powers on Christmas Eve 1968. The Court's verdict had been anxiously awaited since last August when twenty-two states joined the plaintiffs in the Williams case, to ask that the Court overturn or seriously limit the rules of criminal interrogation set forth in its famous 1966 decision in *Miranda* v. *Arizona*. (It holds that the authorities, before they question a criminal suspect, must warn him that he has a right to remain silent, that anything he says can be used against him, that he has a right to consult an attorney at any time and that, if he cannot afford an attorney, one will be provided. No statement taken in violation of this rule is admissible in court.)

But when the Williams decision came down in seven highly emotional and divisive opinions, there was barely a mention of *Miranda* or any of the Fifth Amendment issues of compulsion and self-incrimination it raised. Instead, the Court, voting 5 to 4, based its reversal of Williams's conviction on the defendant's having been denied the counsel that was his right under the Sixth and Fourteenth Amendments.

The decision was, nonetheless, hailed as a major victory for *Miranda*, more because of what it failed to do than for anything it did. The Court's handling of the case passed up what had been widely regarded as an ideal opportunity to reverse *Miranda*, a ruling police have derided as the most serious constraint on their ability to obtain confessions.

But the Court's record on post-*Miranda* cases before it turned to Williams suggests little cause for celebration. If the Williams case demonstrates anything about the Court's attitude toward *Miranda*, it is that a bare majority of the Justices are not yet ready to launch a frontal assault on its protections of defendants' rights. Far from providing any clear victory for *Miranda*, the Williams case probably offers only a temporary respite from the Court's piecemeal erosion of the rule's basic premises. Two fundamental questions remain: how far is the Court willing to go to undermine *Miranda*, and how successful has it been to date? Judging from other recent cases, the answer to the latter is, very successful.

The current Court, under Chief Justice Warren E. Burger, has made no secret of its antipathy to *Miranda*. Justice Potter Stewart, who delivered the majority opinion overturning Williams's conviction, dissented from *Miranda* and has been hostile to it ever since. In one post-*Miranda* decision, he and Justice White called it "an extravagant and unwise interpretation of the Fifth Amendment" privilege against self-incrimination. In another, they labeled it a "constitutional strait jacket" on law enforcement.

A premonition of where the Court is headed on *Miranda* may have been provided by the Chief Justice when, in an unusual oral aside during his condemnation of the Williams decision, he said that, with only one "convert," the Court might some day "bring back rationality." While *Miranda* apparently offends against the Burger Court's definition of rationality, it was the questionable rationality of another doctrine which led to that monumental ruling on defendants' rights. That was the so-called "totality of circumstances" standard which, before 1966, had guided determinations of whether or not confessions were voluntary.

In 1965, the Supreme Court agreed to hear *Miranda* and several related cases, "to give concrete constitutional guidelines for law-enforcement agencies and the courts to follow in criminal interrogation." In offering specific criteria for determining if a statement was voluntary and if the procedures used in questioning violated a suspect's right to remain silent, the *Miranda* Court found that incommunicado interrogation in a "police-dominated" atmosphere was "inherently coercive." It condemned police trickery and procedures that take advantage of a suspect's ignorance of his constitutional rights. And in issuing its new guidelines, the *Miranda* Court scrapped the "totality of circumstances" standard, labeling it "vague" and "inconsistently applied." But it is precisely that kind of standard the Supreme Court has gone to great lengths to resurrect.

Safeguards against compulsion have been severely limited and lower courts encouraged to apply standards far less rigorous than *Miranda*'s in Supreme Court decisions that have found: (*a*) evidence obtained without proper *Miranda* warnings was admissible to impeach the testimony of a suspect; (*b*) a suspect could be reinterrogated despite having previously invoked the right to remain silent; (*c*) *Miranda* warnings were inapplicable to a witness in a grand jury investigation and, (*d*) warnings of the rights to remain silent, to counsel and to terminate questioning need not be given before interrogation to a suspect who had not been placed under arrest.

That last opinion, handed down on January 25 in *Oregon* v. *Mathiason*, provides an extraordinary example of the Court's hostility to *Miranda*. It led Justice Thurgood Marshall to speculate on the enormity of the loophole the case appears to have provided police who feel their hands have been tied by *Miranda*. "I trust," Marshall wrote in a footnote to his dissenting opinion, "today's decision does not suggest that police can circumvent *Miranda* by deliberately postponing the official 'arrest' and the giving of *Miranda* warnings until the necessary incriminating statements have been obtained." But Marshall's "trust" may have been wishful thinking.

To get an idea of how the opinion could work to erode the basic deterrent in *Miranda*—that statements obtained by interrogation without prior warnings cannot be used in evidence—consider the facts in the *Oregon* case as presented by the Court's majority opinion: Mathiason, a parolee who was visiting a state patrol office, was there

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fingered by one of the policemen as a suspect in a burglary. He was given no *Miranda* warnings before being questioned, but was told that "his truthfulness would possibly be considered by the district attorney or judge." He was also told that his fingerprints had been found at the scene of the crime. The statement was not true, but several minutes later Mathiason confessed to the burglary. Only then was he advised of his *Miranda* rights. A taped confession was taken.

The Court found *Miranda* inapplicable to Mathiason solely on the basis of *Miranda*'s definition of custody: "By custodial interrogation we mean questioning by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." The Burger Court virtually ignored the issues of free will raised by the definition, and applied to it the most restrictive interpretation—essentially that Mathiason was not in custody because he had not been arrested. It found his freedom of action had not been denied because he had gone to the station house voluntarily and was supposedly free to depart at any time. The Court ignored, however, that the emphasis of *Miranda* had nothing to do with a suspect's freedom before questioning, but with the constraints and compulsions inherent to the process of interrogation itself. The issue of Mathiason's freedom was raised by Justice Stevens who noted that the suspect was a parolee and "technically in legal custody." Calling on the Court to hear oral arguments in the case (no arguments or briefs had been submitted other than those from the state courts) Stevens said: "[T]he state surely has greater power to question a parolee about his activities than to question someone else. . . . [I]t seems unlikely that a *Miranda* warning would have much effect on a parolee's choice between silence and responding to police interrogation."

In emphasizing custody, the Court conveniently ignored a whole series of issues raised by *Miranda* that address the central issues of free will and voluntariness—issues such as coercion, trickery, the environment in which the interrogation takes place, and the distinction between custodial and "general on-the-scene" questioning.

A Court more sympathetic to *Miranda* could not have ignored the constraints implicit in the parole system, alluded to by Stevens. The *Miranda* decision, after all, warned against "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." A Court determined to uphold *Miranda*'s basic assumptions could not have overlooked the fact that Mathiason appeared to have been tricked by the officer's patently false statement about fingerprints. *Miranda* also warned against "deceptive stratagems." Nor could a Court attempting to adhere to *Miranda* have so arbitrarily truncated the definition of custody. *Miranda* distinguished custodial from "general on-the-scene questioning of citizens in the fact-finding process." It said the latter "is not affected by our holding." But Mathiason was not just some guy being questioned on the street. He was the focus of the investigation, a suspect interrogated more than twenty-five days after the crime, in an environment —a closeted police station room—which the Oregon Supreme Court had found "coercive." *Fundamentals of Criminal Interrogation*, a police primer cited in the *Miranda* opinion, suggests the importance of the questioning environment: "The suspect should be deprived of every psychological advantage. . . . In his own office the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of law."

If the Burger Court is intent on returning to the pre-*Miranda* "totality of circumstances" standard for determining the voluntariness of a suspect's statements, it has provided a classic example of how that totality can be ignored or abused. *Mathiason* suggests why the Warren Court found it advisable to junk the "totality" doctrine and set up guidelines that are more specific.

While *Mathiason* may provide the most glaring dramatization of the Court's designs on *Miranda*, an earlier decision had already set the stage for its selective legitimization of police misconduct.

In *Harris* v. *New York* (1971) the Court ruled, 5 to 4, that statements made by a defendant who had been given incomplete *Miranda* warnings before questioning—Harris had not been told of his right to counsel—could nonetheless be used to impeach the defendant's testimony at trial. Like *Mathiason*, the opinion undermines *Miranda*'s basic deterrent—that police may not use improperly or illegally obtained statements as evidence.

The dispute in the *Harris* case turned on whether contradictory statements made by the defendant at the time of his arrest and on the witness stand, regarding two purchases of heroin from police agents, could be used to impeach his credibility before a jury without, at the same time, impeaching his claim of innocence. When he was arrested, Harris claimed he had purchased heroin for a third party at the request of police officers. The prosecution conceded that, under *Miranda*, this statement was illegally obtained. But the prosecution sought to use the statement to contradict Harris's denials on the stand that he had had any involvement in heroin trafficking.

The trial judge allowed admission of the earlier statement, instructing the jury that the evidence could be used to assess Harris's truthfulness, but not his guilt. For obvious reasons, the dissenting Justices claimed that in a juror's mind the issue of credibility or truthfulness would be inextricable from the issue of guilt. If the jury was convinced that Harris had lied about the reason he had purchased heroin at the time of his arrest, it could only conclude that he was guilty—which is precisely what it did.

The logical extension of *Harris* may have already found application in *Mathiason*. Consider what would have happened if Harris had made a confession without *Miranda* warnings, as Mathiason did, rather than a seriously incriminating statement. Would the judge have given similar instructions to the jury, to weigh the confession against the later denial as a measure solely of credibility? There isn't a jury in the world that could deal fairly with such a distinction.

Taken together, *Harris* and *Mathiason* make clear that the Burger Court views *Miranda* warnings not as strict, concrete rules of criminal procedure but rather as broad guidelines. It has rejected the view that incomplete warnings or partial violations of the procedure are necessarily an infringement on a defendant's free will or privilege

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against self-incrimination. Whatever standard the Court may be suggesting for determining voluntariness, it is a far cry from the specificity of *Miranda*.

A third case, *Michigan* v. *Mosley* (1975), provides further evidence of the Burger Court's willingness to erode the basic premises of *Miranda*. In this instance the Court ruled, 6 to 2, that a defendant who invokes his right to remain silent is not necessarily immune from further interrogation. That opinion must be viewed against the Fifth Amendment backdrop of *Miranda*: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease," *Miranda* states. "[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." How many interrogation sessions are needed before a suspect given *Miranda* warnings will fail to take advantage of them has not been precisely calculated, but the Burger Court appears willing to let the police experiment.

Mosley was arrested on the basis of an anonymous tip implicating him in a series of robberies and in a separate robbery-murder. When a detective began questioning Mosley solely on the series of robberies, the suspect invoked *Miranda*. Several hours later, a second detective began interrogating him on the robbery-murder and the suspect made an incriminating statement that led to his conviction in a lower court.

The majority reasoned that Mosley's rights had been "scrupulously honored" because he had been given *Miranda* warnings before interrogation by both police officers and could therefore have terminated questioning at any time. The dissenters argued that "scrupulously honoring exercises of the right to cut off questioning is only meaningful insofar as the suspect's will to exercise that right remains wholly unfettered."

The majority justified reinterrogation of Mosley on the basis of distinctions that appear tailored for the case, albeit by a sloppy tailor. While *Miranda* suggested a single criterion that might permit renewed questioning—the presence of counsel—the Burger Court found that safeguard "not relevant" to Mosley. Instead, it accepted the reinterrogation because a "significant period of time" passed between questioning sessions (between two and three hours), because *Miranda* warnings were repeated by a second police officer at a second location (another floor of the same building), and because the second interrogation session focused on what the Court viewed as a different crime than that raised at the first session. This final distinction was based on Mosley's statement to his first interrogator that he did not want to say "anything about the robberies," a statement which, the dissenters on the Court noted, "may more than reasonably be interpreted as comprehending the Williams murder which occurred during a robbery."

The upshot of Mosley, according to the minority, "encourages police asked to cease interrogation to continue the suspect's detention until the police station's coercive atmosphere does its work and the suspect responds to resumed questioning." What may be equally important about the case is the Court's apparent willingness to establish standards of voluntariness based on selected facts in each case (which may have no application beyond that case), while finding the standards of *Miranda*, in this case the presence of counsel, irrelevant.

While *Mosley, Harris* and *Mathiason* are the most serious erosions of *Miranda*, several other cases have been construed as efforts to limit the rule's scope. In *United States* v. *Mandujano* (1975) the Court denied *Miranda* warnings to a grand jury witness, despite the fact that the government had probable cause to suspect the witness committed a crime and that he might make incriminating statements in the course of questioning. Thus, where *Mathiason* encourages delaying arrest of a suspect, in the hope of obtaining incriminating statements, *Mandujano* may lead to delayed indictments to allow a grand jury to work over a suspect. The use of interrogation without warnings to obtain evidence undermines not only *Miranda* but also the basic tenet of the adversary system—that the state be required to produce its evidence through independent investigation. In another post-*Miranda* case, *Beckwith* v. *United States* (1976) the Court found *Miranda* inapplicable to a "noncustodial interrogation in a criminal tax fraud investigation. The suspect had been apprised of his right not to submit incriminating information under the Fifth Amendment, but had not been given *Miranda* warnings.

Although decisions from the Burger Court have generally served to weaken *Miranda*, there are some cases that upheld the defendants' rights. In *Orozco* v. *Texas* (1969), the Court reversed a murder conviction obtained by police who arrested the suspect in his bedroom at 4 A.M. and questioned him without *Miranda* warnings. In another decision, *Mathis* v. *United States* (1968), the Court rejected a lower court's admission of incriminating evidence obtained in a tax-fraud investigation from a prisoner who had not been given the warnings.

Cases of this sort, along with the more recent Williams ruling, suggest that *Miranda* may be around for a while, despite the damage the Court has inflicted on it. But its future balances on a delicate fulcrum. The example of George Whitmore Jr.—who, under third-degree questioning in 1964 confessed to raping and murdering two women, a crime of which he was entirely innocent—may seem less significant to the current Justices than it did to the Warren Court. The protection of innocent victims is easily lost sight of amid escalating crime rates and reports of increasingly vicious acts of violence. The police may understandably welcome Court rulings that chip away at *Miranda*. How much punishment *Miranda* can take before it becomes unrecognizable remains to be seen, and may depend in large measure on public opinion and how the police and the state courts choose to apply the Supreme Court's decisions. While the Court's attacks on *Miranda* have made it easier for police to cut corners, they still take considerable risks when they arbitrarily deny suspects *Miranda* warnings. The rule still enjoys the status of a household word in this country. Cops-and-robbers TV has elevated it to an accepted component of our criminal justice system. And the current Court may have concluded that, for now, the public will accept the piecemeal dismemberment of *Miranda*'s safeguards, but not its wholesale obliteration. □

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BOOKS & THE ARTS

Modernism in the Streets

GATES OF EDEN: American Culture in the Sixties. *By Morris Dickstein. Basic Books. 300 pp. $12.50.*

PERRY MEISEL

Morris Dickstein's affectionate portrait of the 1960s and its achievements, *Gates of Eden: American Culture in the Sixties,* is an attempt to dramatize and explore what Dickstein calls the "moral landscape" of the age. In search of the "assumptions and feelings that link the individual to the wider public realities of his time," Dickstein draws on the combined resources of literary criticism, politics, intellectual history, and—in perfect 1960s' fashion—autobiography. What emerges is a remarkable array of chapters that provides less a narrative of what actually happened than a series of sustained encounters with the arts and manners of the day.

Despite the autobiographical accent, however, Dickstein is very much the formal critic whether his subject is rock-and-roll, Pynchon or the New Journalism, although it should be said that his examination of popular culture here is confined almost entirely to music and the press. "Unlike those historians who try to catalogue everything," he says, "I've slighted cultural phenomena for which I felt little affinity." Even the book's personal epilogue has for its theme the anxiety of Lionel Trilling's influence, an influence which accounts for Dickstein's belief that literature should be socially significant and politically aware, but which shows even more that autobiography here really means the life of books and ideas. This makes Dickstein's 1960s a very different time from the one experienced by the swarm of hippies pictured on the book's flyleaf, and makes the book itself a rather different one from earlier chronicles of the period.

Although Dickstein contends that the period was not, as many have suggested, an anti-intellectual one, for those of us who were students then, it was downright unrespectable—and, in a curious way, disrespectful—to be an intellectual. Of course, books themselves weren't so much out of fashion as the act of criticism itself. Analysis was the real villain in the moral struggle between spontaneity and reflection. As a result, Dickstein's emphasis on the literary and the philosophical is a welcome relief. His commitment to ideas goes at least as far back as 1967 and is due in large part to his membership in what he calls the "in between" generation which was already well established in its habits and values compared to those of us who were going through our undergraduate years then in a state of contradiction and uncertainty.

What Dickstein's study shows, however, is that the period was surprisingly unified after all, and that the work of writers like Barthelme and rock stars like Dylan was strikingly similar in theme, style and intent. Both the hip and the square shared a commitment to what Dickstein calls "the search for authentic selfhood" and "the demystification of authority," and "both art and politics became instruments of personal fulfillment."

The self, in other words, was paramount, even though Dickstein owes his own fascination with the period to its attempt to combine "the search for personal authenticity" with "the quest for social justice." The Utopian urge was contagious in personal life and politics alike, and Dickstein sees the way "the sixties translated the Edenic impulse . . . into political terms" as an historical outgrowth of the same secular theology by which "Hegel and Marx [had] turned Christian eschatology" into "theories of social change." Thus the Zionism that had secularized Dickstein's own roots in Jewish orthodoxy becomes an implicit part of the story, too, and even mirrors the varieties of black meliorism that he examines in his fine chapter on black literature and politics.

Although these arguments are not altogether new in themselves, *Gates of Eden* is likely to become the official history of the 1960s because it organizes what is already familiar into a sustained critical vision that finds recurrent designs in everything it engages. Like the "primitive satisfactions" of a conventional style of personal life, says Dickstein, "the primitive satisfactions of narrative in fiction, representation in paintings, melody or harmony in music—like clear-cut positions in politics—were highly suspect."

One reason for the suspicions, Dickstein argues, was that objectivity and its conventions came to be recognized as fictions. Here the theme of the self is sounded again, this time in the name of an epistemological revolution that valued subjectivity as the only trustworthy mode of perception. Doubtless the New Journalism was central here, and it put into practice the conviction that the observer was himself a part of the events he witnessed. Thus writers like Richard Goldstein would explain a rock concert by means of his own libidinal fantasies, while Tom Wolfe would deconstruct custom-car racing by drawing on his knowledge of classical painting and aesthetics. Nevertheless, Dickstein finally dismisses Wolfe as "too genteel to let go or to get involved," a judgment that explains why those of us who admired him in the 1960s still wondered whose side he was on. Hence the journalistic Mailer—the Mailer of *Armies of the Night* and *Miami and the Siege of Chicago*—becomes the real hero of the decade and of Dickstein's book, even though Trilling was, for Dickstein personally, the more decisive figure.

Despite his withdrawal as the 1960s unfolded, it was Trilling, Dickstein reminds us, who characterized the student movement as "modernism in the streets." Dickstein's assertion that "the adversary ethos of modernism was becoming real" makes me recall—with no little embarrassment—the paper I wrote on Nietzsche's anticipation of the counter-culture in *The Birth of Tragedy*. Whatever the status of such notions today, though, they were basic to the 1960s, and Dickstein is on familiar terrain when he elaborates this link between what was happening among hippies and what had already happened—or seemed to have happened—among our canonical writers.

Rock music, of course, was the cultural focus of the decade, and Dickstein examines some of its central figures in a chapter on Dylan, the Beatles, and the Rolling Stones that argues for rock as a form of modernism too. "Like its forebears in the heyday of modernism and surrealism," says Dickstein, rock "was

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partly an assault on the audience." Even the lyrics of Dylan and John Lennon, he says, "seemed as surreal" in their own right "as any modernist text." But it is the novel, of course, that most absorbs Dickstein, and he finds in the writers of the 1960s still another version of modernism, "the second coming of modernism in American fiction." This "second coming" was itself divided in two, with the black humorists who emerged in the first part of the decade —Heller, Pynchon, Vonnegut, Southern —expressing by their very paranoia a connection to social realities that would vanish with the appearance of more properly modernist writers in the late 1960s like Barthelme and Rudolph Wurlitzer, for whom "the sense of disconnection," says Dickstein, "is complete."

Dickstein's assertion that "form can be seen as a structure of perception" is a powerful enough insight to justify his admiration for Vonnegut and Heller alike ("up against a wall," he says, "I'd have to call *Catch-22* the best novel of the sixties"), and he uses his formulation to distinguish the one-liner, gag strategy of what he calls "verbal" black humorists like Southern or Bruce Jay Friedman from the "over-articulated form" of "structural" black humorists like Vonnegut, Heller and Pynchon. Indeed, such a notion of form also lies behind Dickstein's reading of *The Crying of Lot 49* as an epistemological tract with conclusions about perception akin to those of the New Journalists.

If form is perception, however, the weary self-consciousness of late 1960s' writing like John Barth's stories in *Lost in the Funhouse* suggests that an arid "escape from personality" threatens to be the backlash "to the fury of self-assertion" among writers earlier in the decade. Dickstein has no sympathy for purely nonreferential writing (hence his careful monitoring of the vicissitudes of Wurlitzer's career), and in "the contemporary wasteland" of experimental fiction from the late 1960s to the present he searches among Donald Barthelme's "fragments" or "miniatures" for the remnants of a connection between "form and feeling." Indeed, writers without such a connection do not even merit the designation "modernist" in Dickstein's aesthetics.

Dickstein understands modernism by way of Trilling's contention in the mid-1950s that the "intense conviction of the existence of the self apart from culture is, as culture well knows, its noblest and most generous achievement." From this point of view, of course, the 1960s' "search for authentic selfhood" really does derive from the liberal imagination's definition of modernism as "the self apart from culture," although to understand the full implications of such a position we have to turn to the excellent account of the 1950s with which Dickstein begins his book.

Social conformity and political repression during the Truman and Eisenhower years, he argues, found its cultural counterpart in the aggressive insularity of the postwar Jewish novel where the psychology of "the isolated self" supplants any real concern with society and, with some irony, allows the Jewish intellectual an easy route to assimilation. Indeed, the radical inwardness of this kind of literature—Dickstein offers a fine reading of Bellow's first novel, *Dangling Man*, to demonstrate his contention—was "an atonement for Jewish radicalism" in the 1930s. "The concept of alienation," he says, "lost its social content and took on an increasingly religious and metaphysical cast."

But if psychology was a form of repression for writers like Malamud and Bellow, it was instead a form of insurgent liberation for sexual prophets like the Mailer of *The White Negro* and "The Time of Her Time." Dickstein ascribes this new sensibility to the discovery of a younger, less stoical Freud who becomes "the early prophet of sexual fulfillment." Add to this the discovery of the young, humanist Marx, and the climate was right for Marcuse to attempt his reconciliation of Marx and Freud together in *Eros and Civilization*.

Ironically, though, such ideological heterodoxy was possible because the 1950s had, as Dickstein makes abundantly clear, announced "the end of ideology." A tool of conformity and repression on the one hand, "the end of ideology" was a tool of liberation on the other, since it allowed revisionists in both Marxism and psychoanalysis to reread their respective canons and produce less deterministic, more humanistic thinkers than orthodox interpretation had previously allowed. Both the young Marx and the early Freud were taken to be prophets of the self rather than society, of the individual rather than the structures—whether psychological or economic—that determined him. Thoroughly Americanized, the self was now under its own control. It was, in short, beyond culture, and would soon claim to be entirely self-generated.

Hence the conviction of the student movement in the 1960s that our perceptions, beliefs and demands were unique. Despite the American traditions the 1960s revived and extended, few of us knew or felt that an old Left had existed before us, or that our psychedelic music had emerged from now-obvious roots in rhythm and blues. Indeed, the 1960s' version of identity in all spheres of life denied the existence of parentage altogether. His frequent disclaimers notwithstanding, Dickstein himself still seems to believe in the inherent value of the new in a passage like the following: "Whatever the results (and I intend to stress their current limitations), [the techniques of experimental fiction] remain inherently superior to a return to the old stringent molds, which conservative pundits are always ready to reimpose."

Indeed, the 1960s' faith that the new is just as fresh as it seems to be persists throughout many of Dickstein's arguments, and it is difficult to square with the constant pressure of history and tradition that he brings to bear on everything he discusses. As it turns out, our 1960s' writers had made their revolt against authority in the name, alas, of new authorities, Joyce, Kafka and Borges in particular; and our musical heroes, whether they were Joplin, Hendrix or Coltrane, were equally indebted to rich traditions even in their departures from them. (Dickstein is clearly aware of what he calls these "vertical" traditions of influence that cut across the horizontal line of history proper, although they do not appear to cause him any anxiety about his insistence, for example, on modernism's newness even in its "second" American incarnation.) Indeed, this same tension was also present in 1960s' notions about selfhood and society, since our belief in the autonomy of the self tended to clash with our conviction that people —as the young Marx had argued—were essentially social creatures.

It is precisely the belief that there can be a self without society that Trilling himself, as Dickstein points out, had to renounce late in his career, and it is this renunciation above all else that lies

POETRY READING

The winners of DISCOVERY-THE NATION, '77 will read their poems in an event sponsored by The Poetry Center of the 92nd Street YM-YWHA. The competition, a fusion of The Poetry Center's "Discovery" and *The Nation*'s poetry contest, was open to poets who have not been published in book form.

The reading will be held at 8 P.M. on Monday, May 2, in The Poetry Center, YM-YWHA, 92nd St. and Lexington Ave. The winning poems will appear in next week's issue.

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at the center of the adjustments we have had to make in the 1970s. As long as the self was autonomous—as long as its essence lay outside culture, in nature or transcendence—we could maintain a belief in the immanent Eden of something pristine, primordial, something alinguistic and asocial. Such a belief, however, was in direct contradiction to our Marxist notion of essence, and it was also in contradiction to the authority of modernism as a tradition. "Modernity," says Paul de Man, "invests its trust in the power of the present moment as an origin, but discovers that, in severing itself from the past, it has at the same time severed itself from the present."

Of course, such a belief in the self beyond culture meshed perfectly with Trilling's initial position, and what all this finally suggests is that our adversary or counterculture was no counterculture at all, since it was itself continuous with the theological humanism from which it had devolved. Trilling's ultimate withdrawal from a belief in the self beyond culture only illuminated this continuity, and was emblematic of the way in which the modernist imagination of dislocation and discontinuity was replaced by a new style of imagination—a 1970s' style—located instead in continuity itself.

Dickstein's book is an expression of this 1970s' spirit, too, despite its lingering faith in the ideals of the 1960s. Although *Gates of Eden* bears witness to the uniqueness of the 1960s, it is finally a testament to the continuity of American intellectual life since World War II. Indeed, much of the book's warmth and excitement derives from the dense texture of reference in which its meanings inhere, and its most affecting moments—Dickstein's portrait of Delmore Schwartz in particular—are often fervent expressions of feeling for the tradition of Jewish-American letters. Dickstein's own models are Trilling, Alfred Kazin and Irving Howe, even though his prose bears some resemblance to Mailer and to rock journalists like Robert Christgau.

Moreover, in spite of Dickstein's overt dislike for post-structuralist criticism, what he refers to as its "intersubjectivity" effectively describes the categories that his own critical language generates not only on the level of style, but also in its use of recurrent figures like "matrix" or "strand" to signify the relations of which cultural discourse is composed. Nostalgia for the garden has been replaced by nostalgia for legacies and traditions instead. Indeed, our world view has been subject to so deep a change since the 1960s that we can now see a field of connections where we once saw only a wasteland. □

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Human Dialogues Are Born

IVAN SANDERS

A Hungarian novel is reviewed on the front page of *The New York Times Book Review*. The caricature of a Czech author is featured in *The New York Review of Books*. A Polish science-fiction writer is called "one of the deep spirits of our age" by a prominent critic. A new series, "Writers from the Other Europe," is edited by one of America's best-known novelists. Eastern European literature, it seems, has finally made it to these shores. Indeed, there are those who believe that next to Latin Americans, only Eastern Europeans produce exciting new fiction nowadays. In some ways, of course, the term Eastern European literature is vague and arbitrary. Geographic proximity need not imply cultural affinities, as Czechs, Romanians, Hungarians know only too well. Easily offended by supranational collective labels, they will quickly call attention to the unique traditions and conventions of their national literatures. Yet, in reading recent fiction from Eastern Europe one is struck by resemblances in tone and sensibility that are only partly explained by the fact that for the past thirty years the countries of Eastern Europe have been in the Soviet orbit. Large chunks of this region had formed part of the Austro-Hungarian Empire, and even after the breakup of the Dual Monarchy many of the successor states were ruled by right-wing dictatorships of varying stripes. To a significant extent, then, these countries were shaped by similar historical and social forces long before the Communist takeover. Royalist, Fascist, Communist sentiments replaced one another swiftly, though often incompletely, with the result that the vestiges of the first two, stubborn habits of mind, have survived, and even coexist with the official ideology. It is perhaps the frequency of historical about-faces, and the underlying continuity of authoritarian rule, that has made Eastern Europeans wary and cynical, and many of their writers unflappable chroniclers of an absurd reality.

A new work by the Hungarian George Konrád (*The City Builder*, to be published here in the fall) is a complex and highly personal synthesis of that reality. With the skill of a social scientist, the compassion of a humanist, and the stylistic pyrotechnics of the avant-garde, Konrád outlines the political, social and economic history of an unnamed East European city—a city where rulers and ruling classes kept changing but the intoxication with power remained constant, where ideals had the habit of turning into slogans, revolutionaries into bureaucrats, and the pursuit of happiness into a nightmarish obstacle course. The central consciousness in the novel is that of an architect who sees everything from the vantage point of his profession. He comes from a long line of builders, but while his forebears, ruthless, driven men, tried to impose their will on a convulsive world, and sought stability in brick and stone, he is a technocrat in a Socialist society, "a servant of law and order, agent of an open future, wizard of upward-soaring graphs, and self-hating hawker in an ideology shop, all rolled into one." As a young city planner he had been "eager to sketch out the most daring visions of our collective society"; as a middle-aged, middle-echelon executive, however, he is content with his modest share of power, and is glad that years of repression and regimentation have not dehumanized him completely.

Much of *The City Builder* reads like an extended essay, although it is profoundly literary. Its ideas arrive in language of extraordinary power and plasticity. Moreover, by constantly condensing and telescoping events, Konrád manages to pack a number of potential novels into his text. Alfred Kazin has said that novels cannot be written anymore, only scenarios. Eastern European novelists and film makers are particularly adept at schematic, elliptical modes of composition. Konrád merely hints at the specifics of time and place, yet each hint is crucial, for it evokes a state of mind and a way of life. The true protagonist of the novel is the city, whose main square, with its impressive public buildings and statuary, is a memorial to mock heroism and real suffering. The narrator finds his city at once cozy and confining, irreplaceable and detestable—"an Eastern European showcase of devastation and regeneration" that "can welcome its enemies with salt and bread and, having taken crash courses in the art of survival, change its greeting signs, statues, scapegoats—its history."

In his much-praised first novel, *The Case Worker*, Konrád already proved his stylistic agility. *The City Builder* is another bravura performance, though here, too, the verbal abandon, the stunning fusion of abstract and concrete, the tricky interplay of reality and fantasy add up to more than a self-conscious tour de force. Konrád has evidently learned a great deal from Joyce and the French nouveau roman, but like many technically accomplished East European avant-gardists, he eschews the impersonality of modern fiction. In *The City Builder*, cynicism and quiet despair yield periodically to anguished litanies, appeals, exhortations. In one particularly effective recital, Konrád's narrator speaks not only for himself and his fellow citizens living in a repressive Eastern European society, but for all peoples yearning for a freer, more human life:

> I don't want a city in which pedestrians are chased by warning signs amid ruined or abandoned walls; where nothing is allowed, nothing is possible, nothing is worth the trouble; where ready-made regulations stare at me from store-windows. I don't want a city where everything stays the same, where suspicion oozes from plaster walls, squares are contaminated by idiotic repetitions, and a heap of garbage on the corner reminds me of my deformities. I don't want a city where I cower to avoid being snapped at, until I am snapped at for cowering; where greatness is an obtrusion, cowardice is peace and talk is conspiracy; where I have to like the way things are because they can not be otherwise; where cunning nobodies search the bunkers of wasted years, and . . . street-corner lottery-ticket vendors represent transcendence.

For all his humanist sensibility and reformist zeal, Konrád excels at constructing scenes of concentrated cruelty. The highlights he offers from his city's history culminate invariably in sieges and slaughters. His main character as well as other figures who flit in and out of the narrative are survivors of various ordeals who like to think they have been chastened by their harrowing experiences but who realize with horror that they have only been brutalized by them. In a passage describing refugees from concentration camps, the narrator speaks of those who "lived through every barrage, who on their narrow bunks washed the bloody excrement off their bodies and, for meat to go with their turnip, pulled worms from the ground and denuded porcupines; who stood up on snowy roads even when it was no longer their feet but their memory that lifted them; who while watching the yellow smoke of the crematoriums suddenly straightened up, who would rather wheel their half-dead barracks-mates to the ovens than have them do the wheeling, who in order to avoid being killed, became killers themselves."

The plight of the survivor has become a familiar theme in the literature of the

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holocaust. According to Terrence des Pres, the survivor "is the first of civilized men to live beyond the compulsions of culture; beyond a fear of death which can only be assuaged by insisting that life itself is worthless." Much of what has come to be known as the "literature of atrocity" has been written by Eastern Europeans who were themselves victims of Nazi persecution. It is not surprising, therefore, that descriptions of the most devastating assaults on human dignity are to be found in their works. In his preface to the recently republished paperback edition of Tadeusz Borowski's collection of stories, *This Way for the Gas, Ladies and Gentlemen,* Jan Kott quotes Borowski's admonition to survivors of death camps writing about their experiences: "The first duty of Auschwitzers is to make clear just what a camp is. . . . But let them not forget that the reader will unfailingly ask: But how did it happen that *you* survived? . . . Tell, then, how you bought places in the hospital, easy posts, how you shoved the 'Moslems' [prisoners who had lost the will to live] into the oven, how you bought women, men, what you did in the barracks, unloading the transports, at the gypsy camp; tell about the daily life of the camp, about the hierarchy of fear, about the loneliness of every man. But write that you, you were the ones who did this. That a portion of the sad fame of Auschwitz belongs to you as well." Borowski took his own advice. As soon as he came to the realization that "in this war . . . freedom, justice and human dignity had slid off man like a rotten rag," he could easily understand, and even identify with, fellow inmates who hit upon a new way of burning people, or prisoners who discovered the taste of human brains. When heaps of tangled bodies become an everyday sight, the vision of a "weird snarl," "a gigantic stew concocted out of the human crowd" is no longer just a nightmare.

Predictably, Borowski's early critics accused him of "amorality, decadence and nihilism." We know that for years the regimes of Communist-dominated Eastern Europe banished despair from literature. Motivated by naive idealism and the worst kind of prudery, convinced that optimism can be decreed and heroism made to order, they indignantly described works like Borowski's as "destructive." (Of course, resistance to depictions of unspeakable atrocities was strong in the West as well. For instance, the first edition of Jerzy Kosinski's *The Painted Bird* was heavily censored by its American publisher, and there is that ignorant and malicious country woman in Flannery O'Connor's gripping story, "The Displaced Person," whose distaste for images of war is a grotesque parody of "progressive" attitudes. She recalls seeing a newsreel in which bodies of naked people were piled high, "a head thrust in here, a hand there, a foot, a knee, a part that should have been covered up sticking out, a hand raised clutching nothing," and concludes that such things happened in Europe because people there were not as "advanced" as in America, their religion had not yet been "reformed.")

Borowski wrote his Auschwitz stories right after the war. In a second wave of Eastern European holocaust fiction, which came ten-to-fifteen years later, *l'univers concentrationnaire* was enlarged to encompass Stalinist prison camps as well. The slogans had changed, but the affronts to sanity, the hero worship, the vilifications, the terror, were agonizingly familiar. For all their compulsively precise details, such Eastern European masterpieces as Piotr Rawicz's *Blood from the Sky* or Ladislav Fuks's *Mr. Theodore Mundstock* are open-ended and allegorical. Rawicz's haunting novel is about the odyssey of a survivor in a world he despises, yet its contours are indistinct. In a postscript the author pointedly reminds the reader that the events described "could crop up in any place, at any time, in the mind of any man. . . ." Ladislav Fuks's Theodore Mundstock is a Czech Jew who conquers his fear of the concentration camp by "preparing" for the experience: he sleeps on a plank, carries heavy suitcases and asks a baker to let him take out the loaves from the oven. But to comprehend—and thereby control—an absurd reality is impossible. Mundstock's "vain 'heroic' endeavors," writes Lawrence Langer in his brilliant analysis of the novel, "can be read as a sinister parable for our time."

More recent examples of Eastern European holocaust fiction tend once again to be personal and anecdotal. Powerful allegories have given way to tender tragedies. The authors of new novels about the tragedy of Eastern European Jewry in World War II are most often Jews living in Hungary, Romania, East Germany. Works on Jewish themes are rare enough in Eastern Europe; what lends the few that do appear a special poignancy is their elegiac tone, their undercurrents of anguish, their muted recriminations. The authors know that they cannot be too Jewish, or forget that anti-Semitism is after all a political phenomenon, so they make sure they present a "balanced" picture of wartime atrocities, making heroes and villains of Jews and gentiles alike. Still, the very choice of the subject can be seen as an act of

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courage, and the works themselves are the last echoes of an extensive Jewish culture.

A case in point is the East German Jurek Becker whose novel, *Jacob the Liar* was published here in 1975. Born in Lodz, Poland, in 1937, Becker spent his childhood in ghettos and concentration camps and now makes his home in East Berlin where he is a screen and television writer. His novel is a gently ironic tale of ghetto life in German-occupied Poland. Its unlikely hero, Jacob, raises the spirits of his fellow Jews by inventing bulletins about the progress of the war. The humble owner of a café, Jacob is thought to possess a contraband radio, and rather than disappoint his friends, he feeds them a steady diet of encouraging news. Becker's is a fragile little novel. One feels there is something endearing, as well as sad, about a Polish Jew spinning Sholom Aleichem-like yarns in Communist East Germany. It is Becker's unique vantage point, the knowledge that he is treating a "sensitive" topic, which creates tension and excitement. In *Jacob the Liar*, the irrepressible hope and faith frequently encountered in Eastern European fiction blends well with obligatory Socialist realist optimism, and with the earthy humanism of Yiddish literature. The narrator of Becker's novel describes Jacob's feelings about his fabrications with a nice mixture of pathos and humor:

> Hope mustn't die, or else they won't survive. He knows precisely that the Russians are advancing. He heard it with his own ears. And if there is a God in heaven, they have to reach us, too. And if there is no God, they have to reach us, too. And they have to find as many survivors as possible. It's worth it. And if we will all be dead, then it was an attempt. That's worth it. It's just that he must think up enough things. They will constantly ask new questions. They will want to know details, not only kilometer figures. He must invent answers. I hope his mind cooperates. Not everyone can invent. Till now he has invented only once in his life—many years ago—a new potato pancake recipe with cream cheese and onions and caraway seeds. You can't compare the two.

The search for individual expression and fulfillment is of course a perennial theme in Eastern European fiction. In countries like Poland, Hungary and, for a while, Czechoslovakia, where the evils of the Stalinist period could be dealt with in literature, scores of books have appeared which describe not only the reigns of terrors, the purges and prison camps but the insidious and demeaning spirit of the age that applauded submissiveness, encouraged deceit and rewarded mediocrity. Many of these works saw the light of day only because their authors dutifully pointed out that Stalinism was an aberration and not the result of an inherent flaw in the system; nevertheless, the books often raise agonizing questions, even about the newly declared martyrs. Some of these writers atoned publicly, and no doubt they meant well, but as Jan Kott points out, they "could not resist that most diabolical of temptations—to participate in history, a history for which both stones and people are only the material used to build the 'brave new world.'"

Today the same writers and intellectuals are far more skeptical, and are therefore resented by Philistine leaders who mask their anti-intellectual biases with Populist appeals to "simplicity" in art. Indeed, the clash between a cultured elite and a hostile establishment is among the most frequent themes in the current crop of "dissident" literature. However, because culture as such is sacrosanct in these countries, petty functionaries invariably seek to discredit intellectuals in the name of the tradition most cherished by the persecuted writers themselves. A remarkable though little-known prison diary written by Ukrainian poet Mykhaylo Osadchy, and published recently in English under the title *Cataract*, contains a courtroom scene in which an obviously ill-educated prosecutor tries to prove that the true giants of Ukrainian literature were partial to the Russian language. To bolster his argument he quotes a few lines of verse in praise of the "Ruthenian tongue," not realizing that by Ruthenia the poet had meant the Ukraine, not Russia.

Intellectuals may be at odds with bureaucrats, but the enmity dissolves when the distinction between accuser and accused, warden and jailer, executioner and condemned man is opened to literary scrutiny. The dreadful fellow feeling between oppressor and oppressed is diagnosed and powerfully described by George Konrád in *The City Builder* where he presents a searing vision of an underground nightclub which had formerly been fitted out and used as a torture chamber.

These walls . . . saw a hangman

Three Poems from Medieval Sanskrit

Translated by W.S. MERWIN and JEFF MASSON

When hundreds of prayers at last
had brought him back from long travels and
somehow the day had been got through
all his friends
fools
never thinking of the hundreds of
longing wishes for him
that had led her through the day
went on talking and talking
until she jumped up saying
something bit me
and shaking the end of her sari
wanting him so much
blew out the lamp

From the Amarusataka

Lush clouds in
dark sky of tears she saw my love
if you leave me now *she*
said and could not say more
twisting my shirt
toe gripping dust
after that what she
did all words
are helpless to repeat and
they know it and give up

From the Amarusataka

My husband
before leaving on a journey
is still in the house speaking
to the gods and already
separation is climbing like
bad monkeys to the windows

From the
Siddhahemasabdanusasana

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kneel before his victim and implore him to look back at him just once, and with a burning shriek acknowledge his existence. He not only waited for the moment when a freely smiling face would crumble in white sweat: he also wanted his victim, after his return from the long journey of his suffering, to love him. In the tropical light of insanity the ghosts of this cellar bar could communicate only in the nonsense syllables of sexual violence. . . Even after the severance of all human ties, the victim must know that the tormentor, too, has a drop of that other-worldly fuel that he is trying to dry up in his prisoner. Toward dawn, when they were both on the floor grunting from exhaustion, simple, human dialogues were born.

The persistent preoccupation of Eastern European writers with political repression, war, and the futile search for personal freedom may strike the Western reader as chastening, but somewhat redundant. Yet, in thinking of the finest examples of recent writing from Eastern Europe—from Tadeusz Konwicki's disjointed, dreamlike narratives about the terrible consequences of war to the Yugoslav Miodrag Bulatovic's seamy anti-war tales; from Ludvík Vaculík's stark political allegories to Stanislaw Lem's flamboyant science-fiction satires—one realizes that unconventional narrative techniques and startling shifts in authorial perspective can cast familiar subjects in new light, and that only by these means can certain realities be approached. □

LITTLE NIGHT STORIES

There was a certain flake. For miles it
tumbled along becoming its real self
lost in its crystal story—crystals
never forsake whatever they first elect.
And so it came to its place, frail
as a piece of lace dipped in pretty
words: "Honor," "Courage," "Hope."

Listen—such words make up the self—
unravel them and it's gone, not even
a thread is left. Even "Cowardice" will help—
it's a human trait in the cold of the universe,
and we have to embrace all we are in this,
our story: a flake, a flake, a flake.

William Stafford

THEATRE

HAROLD CLURMAN

Michael Cristofer, the student Trofimov of Andrei Serban's *Three Sisters*, has achieved something unique in his play *The Shadow Box* (Morosco Theatre). He has written a painless play about three people dying of cancer. It is a serious play, but its tone is almost as light as if it were a comedy. Its writing speeds along with a kind of brisk eloquence. It is at once facile and undeniably sympathetic. One of the means by which oppressiveness and gloom are avoided is by spreading the burdens of the play's material over a variety of patients. It would appear that numerical addition of misfortune is less sad than the fate of a single individual.

There are three cottages on the grounds of a large hospital. A terminal "case" is lodged in each one. In the first is a plain Joe, an uncomplaining member of the blue-collar working class who to the naked eye looks sturdy and well. His wife comes to visit him with their adolescent son who has not been informed of his father's illness. His wife refuses to believe in the diagnosis of her husband's illness because she is terrified of it.

In the second cottage is Brian, a voluable and witty intellectual whose wife abandoned him and became a desperately promiscuous woman. Brian lives in his cottage with a homosexual young man who began his connection with Brian as a hustler but has become genuinely attached to him. (The homosexual is more faithful to Brian than his wife could possibly be.) Perhaps the link between the two men is in their mutual suffering. While Brian accepts his destiny by an effort of intelligence, he is terribly frightened of it. His thought approximates that of Lucretius, "While it [death] is, I am not, while I am, it is not."

In cottage three, Felicity, a crusty old woman, keeps herself perky by deriding the doctors who try to prolong her life. Though the lesion has progressed further in her than in any of the other cottage occupants, she may endure the longest because she is sustained by the hope of seeing her favorite and eldest daughter Claire, who she does not know has been killed in an accident. (Hope is the most potent medicine.) Another daughter, Agnes, fosters her mother's illusion by writing letters, signed Claire, promising imminent return.

There is an unavowed sentimentality in the play, but it is not soppy. Joe, looking back on his life's experience, feels that he has labored for many years at a meaningless job and that there was nothing in it he ought to regret giving up. Yet for all its mediocrity, his wife, as his hard-pressed housekeeper and the mother of their happily unaware son, wants her husband to live: she loves him. Despite all, he has made her and her son's life good.

Brian knows that what is born must die, life implies death; it is its definition. No one who cannot face the fact can ever achieve maturity of mind or spirit. His decency of behavior, his appetite for knowledge, his humane understanding have inspired a certain dignity in his homosexual companion. And while we are charmed by aged Felicity, who lives through unavailing hope, it is the patience and suffering of her daughter Agnes who, albeit with resentment, serves as her mother's nurse and abets her fantasy, which makes her a noble figure.

What is shrewdly omitted is all clinical taint; the agonies of disease are glossed over. The main characters are nicely traced, though there is something stagy in the presentation of the homosexual, and something almost unnecessary in the inclusion of Beverly, Brian's whorish wife. The author's attitude is stalwart; you may even call it life-affirming.

Gordon Davidson's direction of the admirable cast he has chosen is immensely helpful to the play's success as a theatre piece. As artistic head of the Mark Taper Forum in Los Angeles for the past ten years, he has proven himself especially gifted in guiding actors to truthful performances.

Notably affecting in this instance is the honest emotionality of Rose Gregorio as Agnes. There is heavenliness in Geraldine Fitzgerald's smile, voice and speech; she is Felicity. Laurence Luckinbill as Brian does the best work of his career thus far; he makes his difficult role engaging as well as wholly convincing in both its bright and dark shades. Joyce Ebert as Joe's wife brings a richness of simple womanly feeling to the part. But no one in the company falls short of his or her task. □

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FILMS / Robert Hatch

It must be said for the German director, Werner Herzog, that he is sturdily aloof from the fashions that surround him. At a time when the screen is preoccupied with technological holocausts, demonic possession, sexual permutations and computerized crimes against the state, he offers in *Aguirre, the Wrath of God* a historical tragedy of uncompromising romance. It is some time since we have seen anything like the two heroines of this chronicle (Helena Rolo and Cecilia Rivera) who, after weeks of passage on a raft down variously turbulent and miasmic stretches of the uncharted Amazon, meet their fates with the velvet of their gowns unspotted, their starched ruffs immaculate and their coiffures as lustrous as if they were attended daily by personal maids. And though their only companions are rough adventurers in quest of El Dorado, they are not troubled by so much as a steady gaze. There is something endearing about such foolishness in our abrasive age.

The film is said to be based on a diary kept by a priest who accompanied the explorers (the Spaniards brought Christianity to the Indians, much as we bring the American Way of Life to all and sundry), but Aguirre himself (Klaus Kinski) is Shakespeare's Richard III, without the flashing poetry, but with much of the gallows humor. He is a self-proclaimed and self-congratulatory villain, with a bitter smile and a short way with those whose notions of loyalty or compassion would impede his course. Second in command of a party sent ahead by Pizarro to scout the unknown territory, this Spanish crookback is obsessed by a lust for power and fame; he despises his companions who hunger for mere gold and prate of bringing the heathen to Christ. He aspires to treachery, scheming to seize a great realm in South America, not for the Spanish crown or for God but for himself. Everyone on the journey is more than a little mad (I except the ladies, who are there willy-nilly), but Aguirre is mad with a difference.

So, as the expedition battles the fierce stream, Aguirre and his henchman dispose of their companions by ones and twos; meanwhile, unseen Indians on either bank are working away on the intruders with poison-tipped arrows. The somewhat predictable result is that after a time Aguirre is alone on the raft with an infestation of small but highly symbolic monkeys; deranged by his obsession and the fevers of the jungle, he limps about on the careening platform, waving his sword and exhorting the company called forth by his hallucinations to follow him to Mexico, there to challenge Cortez.

I omit a number of melodramatic incidents and a company of heterogeneous and colorful desperadoes ranging from a chuckle-headed prince of the realm to a black slave and a baptized Indian. On the human side, Herzog's film is an ironic exposure of the consequences of collective madness, which indeed seems to have seized the Spaniards when the fabled wealth of the New World beckoned to them. The real protagonist of his film, what he gives his heart to, is its setting, the roaring river and the lushly seductive and deadly, endless forest. Herzog films the course of the Amazon with lingering fascination and utter disregard for the labor and cost involved in displaying it. He

". . . it is feasible to harvest enough of our daily income of extraterrestrial energy as well as of the surface eruptive steams of internal Earthian infernos all generated at an inexorable, nature-sustained rate to provide all humanity and all their generations to come with a higher standard of living and greater freedoms than ever have been experienced by any humans and to do so by 1985, while completely phasing out all further use or development of fossil fuels, atomic and fusion energies."

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will dwell so long on a procession making its way down a serpentine path, or on a particular section of savage water that one peers intently into the scene, looking for a narrative clue. But the director's purpose in such passages is aesthetic, not narrative. And that is how, I think, the film should be enjoyed—as an engrossing, but not infrequently preposterous costume melodrama that by great good luck takes place in wild, awe-inspiring and continuously engrossing surroundings. □

MARKINGS

You have not asked to be where you are.
The sunset cloud-bouquet is spectacular.
A schooner in a dream. You know by now
that nothing that can happen to you
can come to more than this.

Cloud-tints that will not make an
absence; a betrothed, a friend
descending a ship's ladder as if
the arrival of someone you loved
were a photograph in your hand.

Just once, as if the speeding landing craft
were forever nearing,
the wind-blown figure
forward near the prow, just once
to love, to live as if
the flower skies would never change . . .

But the markings are too deep within you.
You have absorbed by now the limits.
The permanence that you can have
and are too aware you will,
is not the one you crave.

Arthur Gregor

RECORDS

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BACH: *Musical Offering.* Chamber ensemble; Gustav Leonhardt, solo harpsichordist and director. ABC Classics. ABCL 67007. $6.98.

Claves Bach Soloists. CMS/Oryx EXP 70. $6.98.

Now that Christoph Wolff's researches seemed to have cleared away the puzzles surrounding the apparently eccentric format and ordering of the original publication of the *Musical Offering*, the long-standing arguments about the "proper" order in which to perform its parts may be deemed moot. The work's self-evident coherence is that of individual pieces radiating from a single central musical concept; it is a compendium of possible treatments of Frederick the Great's theme, rather than a linear, cyclical development of it. Bach evidently did not intend these treatments—ten canonic settings, a trio sonata and two astounding keyboard ricercars—to be performed at a sitting. The three major pieces stand on their own quite well, and are often so treated, but the whole happens to fill an LP record and is thus frequently so presented—which is well and good as long as one doesn't expect a cumulative effect, rather perhaps dipping in for a few selections at a time.

Both these performances follow the same order, with the two ricercars framing seven canons on one disc side, the remaining canons disposed around the trio sonata on the verso. The Claves group affects a variety of instrumentation somewhat beyond the minimum implicit in Bach's original print (flute, two violins and continuo), and indulges in the grotesque expedient of setting forth

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the six-part ricercar on three harpsichords—to no perceptible musical gain, since all the notes, by what can hardly have been a coincidence, lie perfectly well under the fingers of a single player. Sacrificed altogether is the rhythmic flexibility a single player can achieve, while toward the end everything congeals into a ghastly kind of swinging march tempo, result of the strictness needed to maintain ensemble.

By contrast, the Leonhardt performance is properly conservative in instrumentation (though details are not given, the instruments used are apparently period ones or copies thereof), subtle and lively in phrasing and rhythm. How comforting to find the best scholarship allied with the best musicianship—an accolade that I would also grant to other discs in ABC's first release drawn from the German Seon series. Particularly pleasurable are a set containing Mozart's first two violin concertos, plus a selection of concertante movements from serenades and the like, played with sweetness and elegance by Jaap Schröder, with the Amsterdam Mozart Ensemble led by Frans Brüggen (ABCL 67010/2, two discs); and two quartets from Haydn's Op. 20, played by Schröder's Quartetto Esterhazy (ABCL 67011). The sound of the gut strings, on instruments restored to their 18th-century form, is thoroughly entrancing, but no more so than the sensitively pointed playing, all its effects conceived within the potential of the instruments for which the music was created.

The standard of packaging and annotation in these releases strikes me as uneven, given their evident high aspirations. None of the three above-mentioned releases specifies exactly what "original instruments" are used, although another two-disc set of organ music from the 16th, 17th and 18th centuries, played on contemporary organs (ABCL 67008/2), tells us all about the organs, *not a word about the unfamiliar music* or its composers. And a charming disc of Renaissance Christmas music, sung and played by the excellent Capella Antiqua München (ABCL 67002), does identify the instruments, describe the music, and print the Latin texts—but without translation. In most cases, the program notes are repeated in French and German as well as English, which may have been necessary in the original European market but seems superfluous in these freshly produced editions intended only for North American distribution. (In this context I should note that the disc pressings are mostly above the usual domestic standard; only on one side of the Mozart set did I encounter a surface flaw.) All this is worth discussion precisely because the audible part of the series has been so well carried out; that's the hard part, and the rest should be relatively easy to fix.

SCHUBERT: Excerpts from stage works. Elly Ameling, soprano. Claes-Haakon Ahnsjö, tenor. The Rotterdam Philharmonic Orchestra, Edo de Waart, cond. Philips 9500 170. $7.98.

Of Schubert's seventeen stage works, some were never finished, few were ever performed. Libretto trouble is one obvious reason; he was partial to friends and dilettantes, and having little stage experience, he never developed the kind of theatrical acumen that drove Verdi's and Puccini's librettists to desperation and in the process made their operas work. On the evidence of this sampling, the librettos didn't get any better between 1815 and 1823, and though the music's intrinsic interest—individuality of melodic contour, inventiveness of figuration and texture—marched steadily forward, Schubert's sense of theatrical pacing didn't. This well-chosen exhumation includes a pleasant extended stretch from *Alfonso und Estrella*, as well as an early overture and assorted arias and duets, performed with an easy, gracious charm. □

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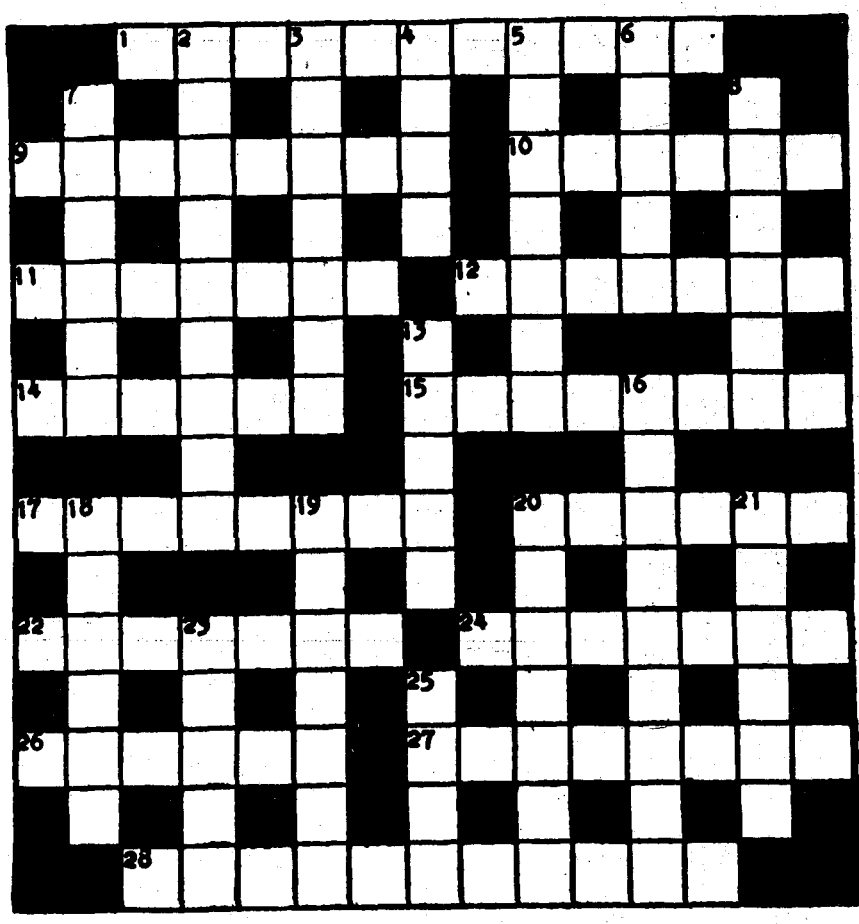

ACROSS

1 The little one who said ". . . and I see her sleeping in my bed!" and what he might do. (4,7)
9 Sign the healer might be proud to display, or just one in the beauty shop window? (8)
11 and 10 What the watchman might do, as well as three-minute sessions. (4,3,6)
12 It's a bird of a hangover on board! (7)
14 Before the beginning of the year, a place where the head is superior. (6)
15 Is the news read poorly, when questions are? (8)
17 See 3 down
20 Descriptive of the prim and slightly sissy type. (6)
22 One might expect the pupils to be expanded by them. (7)
24 Am only a bit shaken by one being so unusual. (7)
26 Without a doubt, you're very brave to have it! (2,4)
27 Not very successful at getting a bit over-confused. (8)
28 If you're in deep, one way to get out. (6,5)

DOWN

2 With him, we might recognize the subject in the accusative case. (5,4)
3 and 17 across In general, would this imply the diction isn't polished? (7,8)
4 Not quite perfect thought? (4)
5 Such people always seem to have the average short answer. (7)
6 It's a clever act to slow the growth of something this way. (5)
7 Not a very good tune that a canary might have warned you against at one time. (3,3)
8 The sins of public promotion might be difficult to accept, even if good. (6)
13 Sudden noises right in front of your head? (5)
16 It might describe the problem of bad aiming, etc. (9)
18 Bully for this! (4,2)
19 In a rather poor fashion, the equivalent of 7 down was once along the Adriatic. (7)
20 She found trouble in a box or in an exotic animal. (7)
21 Woe is me! It comes up about a half-dozen in a type of test for the winner. (6)
23 and 25 Starts to walk out in unoccupied territory. (4,5)

SOLUTION TO PUZZLE NO. 1675

ACROSS: 1 Over the hill; 9 and 17 Poor relations; 10 and 11 Going over; 12 and 29 The fall of man; 13 Measure; 15 Dominant; 16 Thrash; 18 and 8 King of Hearts; 21 Nihilist; 24 Editors; 26 Diction; 28 and 14 Molesting; 30 Oath; 31 The greatest. DOWN: 2 Verifying; 3 Regalia; 4 Heir; 5 Highest; 6 Looks; 7 Boohoo; 19 and 23 Indoor sports; 20 Furlong; 22 Hairnet; 25 Teeth; 27 Smee.

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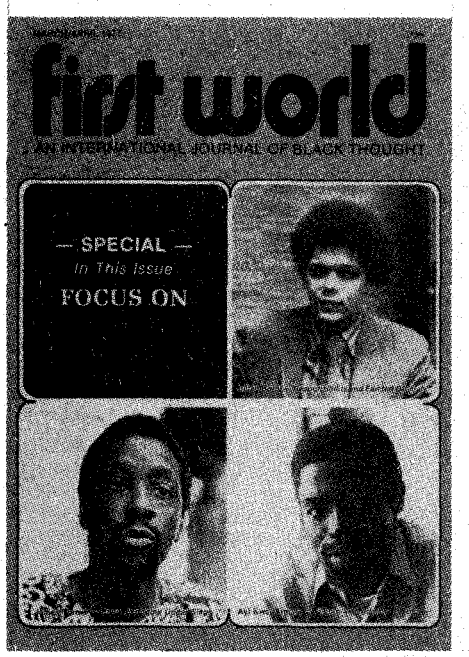

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